

On October 9, 2007, Plaintiff Joe Flores and Plaintiff Connie Flores (“Plaintiffs”) filed a second amended complaint (“complaint”). The complaint contains six causes of action: (1) Malicious Prosecution and Malicious Use of Process; (2) Conversion; (3) Civil RICO; (4) Breach of Duty of Care; (5) Civil Conspiracy; and (6) Constructive Trust.

On October 25, 2007, Defendants Dennis Hagobian, Victoria Hagobian, Dennis Hagobian Residence Trust, Victoria Hagobian Residence Trust, Rod Christensen, and Yosemite Technologies Inc. (“Hagobian Defendants”) filed a motion to dismiss the complaint. On October 26, 2007, Defendant Russell Davidson joined the motion to dismiss filed by Hagobian Defendants. On October 31, 2007, Defendants Sandy L. Vartan, Judith Yeramian, the Judith Mary Yeramian Family Trust, and the Lee Yeramian Exempt QTIP Trust (“Yeramian Defendants”) joined the motion to dismiss. Defendants contend that Plaintiffs’ first cause of

1 action for malicious prosecution must be dismissed for failure to state a claim because the  
2 complaint does not allege lack of probable cause or malice. Defendants contend that Plaintiffs'  
3 second cause of action for malicious use of process is barred by the litigation privilege and fails  
4 to state a claim. Defendants contend that Plaintiffs' third cause of action for RICO violations is  
5 barred by the statute of limitations and fails to state a claim. Defendants contend that Plaintiffs'  
6 fourth cause of action for breach of the duty of care fails to state a claim. Defendants contend  
7 that Plaintiffs' conspiracy allegations fail to state a claim. Defendants contend that Plaintiffs  
8 have alleged nothing that would entitle them to the remedy of a constructive trust.

9 On November 21, 2007, Plaintiff Joe Flores filed an opposition to the motion to dismiss.  
10 On November 21, 2007, Plaintiff Connie Flores filed an opposition. On November 26, 2007,  
11 Hagobian Defendants filed a reply brief. On November 26, 2007, Plaintiff Joe Flores filed a  
12 supplemental opposition, which Plaintiff Connie Flores joined. On December 5, 2007,  
13 Hagobian Defendants filed a substantive reply to Plaintiffs' oppositions.

#### 14 15 **LEGAL STANDARD**

16 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil  
17 Procedure for "failure to state a claim upon which relief can be granted". Fed.R.Civ.Pro.  
18 12(b)(6). A Rule 12(b)(6) dismissal can be based on the failure to allege a cognizable legal  
19 theory or the failure to allege sufficient facts under a cognizable legal theory. Balistreri v.  
20 Pacifica Police Dep't, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990); Robertson v. Dean Witter Reynolds,  
21 Inc., 749 F.2d 530, 533-34 (9<sup>th</sup> Cir.1984). In considering a motion to dismiss, the court must  
22 accept as true the allegations of the complaint in question, construe the pleading in the light most  
23 favorable to the party opposing the motion, and resolve all doubts in the pleader's favor.  
24 Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976); Jenkins v. McKeithen,  
25 395 U.S. 411, 421 (1969); Broam v. Bogan, 320 F.3d 1023, 1028 (9<sup>th</sup> Cir. 2003).

26 For a complaint to avoid dismissal pursuant to Rule 12(b)(6), the complaint need not  
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1 contain detailed factual allegations; rather, it must plead “enough facts to state a claim to relief  
 2 that is plausible on its face.” Bell Atlantic Corp. v. Twombly, – U.S. –, 127 S.Ct. 1955, 1974  
 3 (2007); Weber v. Department of Veterans Affairs, 512 F.3d 1178, 1181 (9<sup>th</sup> Cir. 2008). While a  
 4 complaint need not plead “detailed factual allegations,” the factual allegations it does include  
 5 “must be enough to raise a right to relief above the speculative level.” Twombly, 127 S.Ct. at  
 6 1964-65. Federal Rule of Civil Procedure 8(a)(2) requires a “showing” that the plaintiff is  
 7 entitled to relief, “rather than a blanket assertion” of entitlement to relief. Id. at 1965 n. 3.  
 8 Legal conclusions need not be taken as true merely because they are cast in the form of factual  
 9 allegations. Robertson v. Corrothers, 812 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1987); Western Mining  
 10 Council v. Watt, 643 F.2d 618, 624 (9<sup>th</sup> Cir.1981). “Nor is the court required to accept as true  
 11 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
 12 inferences.” Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9<sup>th</sup> Cir.2001), *amended by*  
 13 275 F.3d 1187 (9<sup>th</sup> Cir. 2001). A Rule 12(b)(6) motion to dismiss should be granted when a  
 14 plaintiff fails to nudge his or her claims “across the line from conceivable to plausible.”  
 15 Twombly, 127 S.Ct. at 1974.

## 17 **FACTS**

### 18 **A. FACTS ALLEGED IN THE COMPLAINT**

19 The complaint alleges that Plaintiff Joe Flores and Plaintiff Connie Flores (“Plaintiffs”)  
 20 owned and operated an apple farm. Plaintiffs sued DDJ, Inc. and DDJ LLC (“DDJ Entities”) in  
 21 a case entitled Flores v. DDJ, Inc., et al., 1:99-CV-5878 AWI DLB (“Flores I”). On July 25,  
 22 2003, the jury returned a special verdict in Plaintiffs’ favor for over \$750,000.00.

23 The complaint alleges that Hagobian Defendants and Yeramian Defendants are or were  
 24 the owners, members, or directors with more than 10% of stock in the DDJ Entities. The  
 25 complaint alleges that Defendant Yosemite Technologies, Inc. (“Defendant Yosemite”) is a  
 26 corporation organized under the laws of the State of Delaware and conducting business within  
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1 the confines of the State of California. The complaint alleges that Defendant Rod Christensen  
2 is the co-founder and chief technology officer of Defendant Yosemite.

3 The complaint alleges that on February 9, 2001, DDJ, Inc., at the direction of Defendants  
4 Dennis Hagobian, Victorian Hagobian, Dennis Vartan, and Judith Yeramian, filed a counter  
5 complaint against Plaintiffs in Flores I. The complaint alleges that the counter complaint was  
6 meritless and non-tenable, and any reasonable attorney would have abstained from filing and  
7 prosecuting this counter complaint. The complaint alleges that the counter complaint was filed  
8 as a tactic to scare Plaintiffs into dismissing Flores I. The complaint alleges that the actions of  
9 the DDJ Entities were malicious and vexatious, purely to cause annoyance and worry to  
10 Plaintiffs.

11 The complaint alleges that after the Clerk of the Court filed judgment in Flores I,  
12 Plaintiffs made attempts to collect the judgment. The complaint alleges that soon thereafter,  
13 Plaintiffs found out that Defendants had converted Plaintiffs' Property. Specifically, the  
14 complaint alleges that Defendants Dennis Hagobian, Victoria Hagobian, Dennis Vartan, Judith  
15 Yeramian, Russell Davidson, William Davidson and Michael Hedberg as owners, shareholders,  
16 directors, and members of the DDJ Entities conspired with Defendant Rod Christensen to  
17 actively participate in a pattern of unlawful activities. The complaint alleges that shortly after the  
18 sale of all assets and property belonging to the DDJ Entities, the DDJ Entities hired Defendants  
19 Dennis Hagobian and Dennis Vartan as consultants to find investments for the DDJ Entities.  
20 The complaint alleges that Defendants found it worthy to invest a capital infusion into Defendant  
21 Yosemite by converting proceeds that rightfully belonged to Plaintiffs.

22 The complaint alleges that Defendants are "sued under their individual and/or fictitious  
23 names, was or is the principal, and/or actual or ostensible agent, and/or employer, and/or  
24 employee, and/or partner, and/or member, and/or manager, and/or director, and/or shareholder,  
25 and/or alter ego of the other, and with respect to the allegations alleged herein, were at all times  
26 acting within the scope of one or more of such relationships and with the implied and/or

expressed direction, approval or ratification of each of the other defendants.”

### **B. JUDICIAL NOTICE**

Facts subject to judicial notice may be considered by a court on a motion to dismiss. In re Russell, 76 F.3d 242, 244 (9<sup>th</sup> Cir. 1996); Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1388 (9<sup>th</sup> Cir. 1987). The court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9<sup>th</sup> Cir. 1993). Judicial notice may be taken of court records. See, e.g., Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4<sup>th</sup> Cir. 1989); Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9<sup>th</sup> Cir. 1987). The court takes judicial notice of the court records in Flores I.

## **DISCUSSION**

### **A. FIKE DEFENDANTS**

Preliminarily, the court notes that the current complaint contains a cause of action for malicious prosecution against Emerich & Fike, a professional corporation, David R. Emerich, David A. Fike, Jeffery D. Simonian, Thomas A. Pedreira, and Lawrence E. Westerlund (“Fike Defendants”). On August 31, 2006, Judge Oliver W. Wanger, who was then the District Court Judge assigned to this action, granted the Fike Defendants’ motion to dismiss and dismissed the Fike Defendants as defendants from this action. On October 12, 2006, Judge Wanger entered judgment in favor of the Fike Defendants. After further briefing from the parties, on March 29, 2007, Judge Wanger granted Plaintiffs’ motion for certification under Rule 54(b) of the Federal Rules of Civil Procedure and directed the Clerk of the Court to enter final judgment in favor of the Fike Defendants and against Plaintiffs. The same day, the Clerk of the Court made the following entry in the docket of this action at Document #190:

MINUTE ORDER: TEXT ONLY ENTRY - The Court's Judgment entered on 10/12/06 at document number 139 is considered the Court's Final Judgment in

1 favor of the Fike defendants and against Plaintiff. (Robles, S) (Entered:  
2 03/29/2007)

3 Normally, a final judgment is not entered in an action until all claims have been resolved.  
4 However, Rule 54(b) of the Federal Rules of Civil Procedure allows for the entry of final  
5 judgment with respect to less than all parties or claims in an action if the court makes “an express  
6 determination that there is no just reason for delay” and expressly directs “entry of judgment.”  
7 Fed.R.Civ.P. 54(b). Absent a final order pursuant to Rule 54(b), any order or other decision  
8 that “adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties  
9 does not end the action as to any of the claims or parties and may be revised at any time before  
10 the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.” *Id.*

11 In this action, the court has entered a final judgment pursuant to Rule 54(b) as to the Fike  
12 Defendants. Because a final judgment pursuant to Rule 54(b) has been entered, this action  
13 ended as to the Fike Defendants as of March 29, 2007. The current complaint’s “amended  
14 pleadings” concerning the Fike Defendants are not appropriate. Rule 12(f) of the Federal Rules  
15 of Civil Procedure allows the court to strike from “any pleading any insufficient defense or any  
16 redundant, immaterial, impertinent, or scandalous matter.” Striking allegations pursuant to Rule  
17 12(f) is proper if it will make the trial less complicated or if the allegations will be prejudicial.  
18 See Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir 1993), *rev'd on other grounds*, 510  
19 U.S. 517 (1994). The court finds that references to claims against the Fike Defendants, for  
20 which final judgement has been entered, will complicate and confuse the issues remaining in this  
21 action. No causes of action may proceed against the Fike Defendants in light of the Rule 54(b)  
22 judgment. Thus, the court will strike the causes of action and allegations against the Fike  
23 Defendants from the complaint.

## 24 25 **B. MALICIOUS PROSECUTION**

26 The basis of Plaintiffs’ malicious prosecution cause of action is the counterclaim filed by  
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the DDJ Entities in Flores I for \$11,000.00. The complaint contends this counterclaim should have been dismissed when it became known that Traft & Traner, Inc (“T&T”) had purchased the DDJ Entities’ liabilities and property. Plaintiffs argue that the DDJ Entities had no basis to litigate a claim belonging to T&T. The complaint also contends that Plaintiff Connie Flores was named as a counter defendant to this claim, yet she had not signed the contract at issue. The jury in Flores I ultimately found in Plaintiffs’ favor on the DDJ Entities’ counterclaim. In their cause of action for malicious prosecution, Plaintiffs contend that DDJ Entities had no good cause to prosecute the counterclaim when Defendants knew the dispute had been sold to T&T and Plaintiff Connie Flores was not a signatory to the relevant contracts.

Defendants contend that any malicious prosecution claim against Defendants is subject to dismissal based on orders issued by Judge Oliver W. Wanger earlier in this case. Second, Defendants contend that Plaintiffs have failed to show that it was Defendants, and not the DDJ Entities, who caused the counterclaim to be filed.

The court takes judicial notice of prior complaints and orders in this action. Both the original complaint and amended complaint alleged malicious prosecution causes of action against the Fike Defendants and Defendants. On February 21, 2006, Judge Wanger struck the malicious prosecution cause of action as to the Fike Defendants pursuant to California’s “Anti-SLAPP” statute, California Code of Civil Procedure Section 425.16. When determining whether the complaint state a claim, Judge Wanger found, in part,<sup>1</sup>

. . . . The elements of a prima facie case of malicious prosecution are (1) a judicial proceeding favorably terminated; (2) lack of probable cause; and (3) malice. *Villa v. Cole*, 4 Cal. App. 4<sup>th</sup> 1327, 1335 (1992). Malicious prosecution actions are disfavored under California law. . . .

The first element is satisfied in this case because the Flores’ obtained a favorable jury verdict in Flores I and defeated the defendants’ cross-complaints. The Fike Defendants maintain that Plaintiffs are unable to establish either lack of

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<sup>1</sup> The court notes Plaintiffs, and at times, Judge Wanger, referred to the counterclaim as a cross-complaint. Because the DDJ Entities were not co-parties with Plaintiffs in Flores I, their claim against Plaintiffs was a counterclaim and not a cross-complaint. The court finds that the use of the term cross-complaint is simply a clerical error and when referencing the DDJ Entities’ cross-complaint Plaintiff and Judge Wanger were referring to the counterclaim.



probable cause or malice.

(1) Probable cause.

Here, Plaintiffs allege that the Fike Defendants prosecuted the cross-complaint in Flores I without probable cause as to both Joe and Connie Flores. The Flores' make a number of general arguments in support of this contention, but none of these arguments satisfy Plaintiffs' burden. First, Joe Flores suggests that the absence of probable cause is established because the jury found that the Flores' were not liable under the cross-complainant. This argument defies logic. The first element of a prima facie case of malicious prosecution is a "judicial proceeding favorably terminated." The jury's verdict satisfies the first element, but Joe Flores suggests that the verdict also satisfies the second element -- absence of probable cause. If this were the case, the second element would be redundant and unnecessary. A greater showing is needed to establish absence of probable cause.

Probable Cause exists to file a claim whenever "any reasonable attorney would have thought the claim tenable." *Sheldon Appel.*, 47 Cal. 3d at 885. Litigants have the right to present claims that are arguably correct, "even if it is extremely unlikely that they will win." *Id.* at 885. Plaintiff correctly points out that, even if a reasonable attorney might believe in the merits of a claim, one cannot escape liability if the action "was prosecuted with knowledge of the falsity of the claim." *Albertson v. Raboff*, 46 Cal. 2d 375, 382; *Bertero*, 13 Cal. 3d at 55.

Turning then to the factual allegations contained within the Complaint and the Flores' oppositions to this motion to strike, the Flores' have not alleged facts to show absence of probable cause or knowledge of the falsity of the claim. First, the Flores' conclusorily allege that the Fike Defendants lacked probable cause to believe that any debt was owed by the Flores' at all under the promissory note. They do not allege facts showing why or how the Fike defendants could then know the claims were merit less. But, the Fike Defendants represent that they reviewed the accounting records and concluded that these records evidenced a \$9,843.66 debt to FMI. Although the jury in Flores I ultimately found that the Flores did not owe DDJ, as assignee, any money on the counterclaim, nothing in the record indicates that the Fike Defendants knew at the time that the claim was filed that the allegations in the counterclaim were false or that the monetary claim was spurious. Nor is there any indication in the record that no reasonable attorney would have believed the counter-claim debt owed was unjustified. (Plaintiffs bear the burden of establishing as much in this case, and cannot rely upon the trial record from Flores I unless there are undisputed judicially noticeable facts that exist.)

Second, the Flores' emphasize that, although Joe Flores signed a promissory note to DDJ, DDJ later sold the note to a third party, Taft & Trainer, Inc. The Fike Defendants acknowledge that this transfer occurred, but maintain that DDJ Inc. had an agreement with Taft & Trainer that DDJ would defend the Flores I lawsuit and pursue any counterclaim for the Flores' outstanding debt under the note. (Fike Decl. ¶16) The existence of such an agreement was supported by written agreements. (*Id.* at Exhibit 2.) Although the jury in Flores I ultimately found that the Flores' did not owe money to either DDJ or Taft & Turner, there is absolutely no indication that the indemnity, assignment, and litigation enforcement agreement was invalid, and, even if invalid, that the Fike Defendants knew of any invalidity or that no reasonable attorney would have believed the agreement to be valid.

Finally, Ms. Flores specifically alleges that the Fike Defendants lacked probable cause to claim that she was a signatory to the promissory note.



Accordingly, Ms. Flores alleges that there was no probable cause to name her as a counter-defendant. Ms. Flores correctly points out that the promissory note itself repeatedly refers to Mr. Flores and never to Ms. Flores (or Connie Flores). For example, it declares that “DDJ, Inc. holds a secured interest in certain apples and proceeds belonging to Mr. Flores.” However, the Fike Defendants submit that both Joe and Connie Flores were responsible for the promissory note because both were signatories to various packaging and marketing agreements and that the promissory note was entered into as part of an overall package of agreements. (Fike Decl. ¶ 15.) Moreover, the promissory note itself states that the note “is secured by the financing statement given to lender from borrower pursuant to their Packing and Marketing Agreement dated February 18, 1997.” (See Promissory Note.) The only relevant inquiry is whether the attorney’s client provides facts that establish the existence of probable cause for the lawsuit’s claims. The opposing party’s competing evidence is irrelevant.

Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh competing evidence, or to abandon their claim if they think it likely that evidence will ultimately weigh against them. They have a right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.

*Wilson v. Parker Covert & Cadaster*, 28 Cal. 4th at 822. Plaintiffs offer no evidence suggesting that the Fike Defendants had any reason to doubt the existence of probable cause to believe that Ms. Flores was a proper counter-defendant.

#### (2) Malice.

To prove malice, Plaintiffs must show that the Fike Defendants filed the underlying action with a wrongful motive. . . . *Centers v. Dollar Markets*, 99 Cal. App. 2d 534, 541 (1950). Malice can be inferred from willful misconduct, *see Drum v. Beau, Fox & Assoc.*, 107 Cal. App. 4 1009, 1020 (2003), but no willful misconduct, such as the intent to vex or annoy, on the part of the Fike Defendants is alleged in the complaint or otherwise evident in the record. This omission is a fatal defect in a malicious prosecution claim.

The Anti-Slap law applies to Plaintiffs’ second cause of action. However, Plaintiffs have failed to establish that this claim is “both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Arrow*, 31 Cal. 4th at 738. The Fike Defendants’ motion to strike the second cause of action for malicious prosecution is GRANTED, with leave to amend.

(Feb/21/06 Order at 20-25).

After Plaintiffs filed the first amended complaint, on August 31, 2006, Judge Wanger found that it had been improper for the court to have given leave to amend the malicious prosecution claim. Regardless, Judge Wanger found the first amended complaint still did not state a cause of action against the Fike Defendants for malicious prosecution. After rejecting new arguments and new facts found in the first amended complaint, Judge Wanger stated:

1 Second, Plaintiffs re-assert an argument that was rejected by the prior  
 2 memorandum opinion — that the Fike Defendants knew or should have known  
 3 that the counterclaim was false because DDJ had assigned the alleged claim to a  
 4 third party. The prior memorandum opinion reasoned that:

5 The Fike Defendants acknowledge that this transfer occurred, but  
 6 maintain that DDJ Inc. had an agreement with Taft & Trainer that  
 7 DDJ would defend the Flores I lawsuit and pursue any  
 8 counterclaim for the Flores’ outstanding debt under the note. (Fike  
 9 Decl. ¶16) The existence of such an agreement was supported by  
 10 written agreements. (Id. at Exhibit 2.) Although the jury in Flores I  
 11 ultimately found that the Flores’ did not owe money to either DDJ  
 12 or Taft & Turner, there is absolutely no indication that the  
 13 indemnity, assignment, and litigation enforcement agreement was  
 14 invalid, and, even if invalid, that the Fike Defendants knew of any  
 15 invalidity or that no reasonable attorney would have believed the  
 16 agreement to be valid.

17 (Doc. 108 at 23.) Plaintiffs now assert that the agreement with Taft & Trainer  
 18 “does not acknowledge the cross-complaint, or that Tracer & Taft assigned or  
 19 otherwise agreed to permit assignment of said liability for Fike Defendants to  
 20 pursue [the cross complaint] on behalf of DDJ, Inc.” (FAR at ¶ 182.) Plaintiffs,  
 21 however, do not explain the legal significance of this failure. Plaintiffs cite,  
 22 without clearly explaining, several other pieces of evidence in support of their  
 23 contention that the Fike Defendants lacked probable cause to believe that DDJ  
 24 retained the right to assert claims against the Flores. For example, Plaintiffs argue  
 25 that:

26 Although Fike Defendants...do mention that “David A. Fike’s  
 27 clients provided him with both testimonial and documentary  
 28 evidence that DDJ, Inc., has an agreement with Trainer & Taft,  
 29 Inc., that DDJ Inc., would take responsibility for defending the  
 30 underlying lawsuit and for pursuing the counterclaim for Flores’  
 31 outstanding debt. (Fike Decl., ¶ 16). (See Memorandum of Points  
 32 and Authorities in Support of Motion to Strike Certain Causes of  
 33 Action from Complaint at 11:22-25). In addition, David A. Fike, in  
 34 his Declaration clearly indicates that “DDJ Inc., had an agreement  
 35 with Tracer & Taft, Inc., that DDJ Inc., would take responsibility  
 36 for defending the underlying lawsuit and for pursuing the  
 37 counterclaim for Flores’ outstanding debt. (See Declaration of  
 38 David A. Fike, at ¶ 16). The sworn testimony of David A. Fike  
 39 which references Dennis Vartan and Dennis Hagobian, is quite the  
 40 opposite of what David A. Fike contends in his Declaration. (See  
 41 Declaration of Attorney, Marshall C. Whitney, in support of  
 42 Motion to Strike at Exhibit ‘A’ at pg. 949-962 [testimony of  
 43 Dennis Vartan at trial on underlying action] also see id at Exhibit  
 44 ‘B’ at pgs. 1306-1428:2 [testimony of Dennis Hagobian]). More  
 45 specifically, Dennis Hagobian testified that Tracer & Taft assigned  
 46 [to] DDJ, Inc., the Flores’ liability note back to DDJ, Inc. [sic]  
 47 Should testimonies of both, Dennis Vartan and Dennis Hagobian  
 48 be credible, then surely DDJ Inc., and Fike Defendants were not  
 49 prosecuting the counterclaim for breach of contract on behalf of  
 50 Tracer & Taft as the Court contends.

51 (Doc. 110 at 3.) But, the testimony cited by the Flores is from the jury trial before  
 52 Judge Ishii and has little or no bearing on whether the Fike Defendants had

probable cause to file the counterclaims in the first place. Moreover, a review of the testimony cited by the Flores' reveals that Dennis Hagobian consistently testified that DDJ retained the right to pursue a counterclaim against the Flores' to collect outstanding debt. (See Doc. 34, Whitney Decl., Ex. B at 1427.) Again, the existence of somewhat contradictory testimony elsewhere in the trial record does not establish the absence of probable cause. It supports the inference that evidence exists to support both positions.

....

Finally, Plaintiffs re-assert the previously rejected argument that the Fike Defendants "knew or should have known that Connie Flores was not participating in the marketing agreement or any kind of financial agreement with DDJ, Inc., for the crop year of 1997." As evidence in support of this assertion, Plaintiffs rely exclusively on Judge Ishii's memorandum decision in Flores I concerning Connie Flores' petition in for attorney's fees under California Civil Code § 1717.

... Plaintiffs suggest that DDJ's assertion of this defense (and Judge Ishii's discussion of the defense in the memorandum decision) supports a finding that the Fike Defendants, who represented DDJ in Flores I, knew at the time the counterclaim was filed that Ms. Flores had not signed the relevant documents and therefore lacked probable cause to file the counterclaim against her.

Plaintiffs read too much into Judge Ishii's decision, which examined the jurisprudence pertaining to attorney's fees awards under section 1717 in some detail. The decision reasoned that Ms. Flores would only be entitled to an award under section 1717 if she would have been liable on the contract claim had the jury returned a verdict in favor of Defendants. But, contrary to Plaintiffs' suggestion, Judge Ishii specifically noted in his analysis that DDJ "clearly believed if [it] prevailed, [] Connie Flores would have been liable for the advanced funds along with Flores would have been liable for the advanced funds along with [] Joe Flores." (Doc. 342 at 6.) In part as a result of this finding, Judge Ishii concluded that Connie Flores was entitled to attorney's fees under section 1717. Judge Ishii's opinion does not on its own support a finding that the Fike Defendants lacked probable cause to name Connie Flores in the counterclaim. In fact, it supports the opposite conclusion by finding that DDJ "clearly believed" in the merit of its original counterclaim against Ms. Flores. The Flores' advance no additional evidence or arguments in support of such a finding.

(08/31/06 Order at 22-26).

Defendants contend in the current motion to dismiss that Plaintiffs' allegations as to Defendants are the same as the allegations previously alleged as to the Fike Defendants. Defendants contend that the malicious prosecution cause of action against Defendants must follow the same result as the malicious prosecution cause of action against the Fike Defendants.

### **1. Claim Preclusion**

Res judicata, or claim preclusion, "bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the

previous action was resolved on the merits.” Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1078 (9<sup>th</sup> Cir. 2003); United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 909 (9<sup>th</sup> Cir. 1998)). Res judicata applies when there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. Hells Canyon Preservation Council v. U.S. Forest Service, 403 F.3d 683, 686 (9<sup>th</sup> Cir. 2005); Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052 (9<sup>th</sup> Cir. 2005); Tahoe-Sierra, 322 F.3d at 1077. “The doctrine of res judicata provides that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action, and is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.” Headwaters, 399 F.3d at 1051-52 (internal quotation marks omitted).

**a. Identity of Claims**

To find claim preclusion, the court must find identity of claims between Plaintiffs’ malicious prosecution cause of action against the Fike Defendants and the malicious prosecution cause of action against Defendants. “The central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts.” Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9<sup>th</sup> Cir. 2000) (internal quotations omitted). Specifically, courts consider the following factors: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Id.

Here, the malicious prosecution cause of action against the Fike Defendants and Defendants arise from the same transactional nucleus of facts. The malicious prosecution claims against both the Fike Defendants and Defendants concern their alleged involvement in the DDJ Entities’ counterclaim against Plaintiffs during Flores I. The malicious prosecution claim against Defendants rests on their alleged actions that compelled the Fike Defendants to file the

1 counterclaim on behalf of the DDJ Entities. Finding that a malicious prosecution claim is  
2 available against Defendants but not available against the Fike Defendants is inconsistent. The  
3 alleged facts underlying both malicious prosecution claims are almost identical. In both claims,  
4 Plaintiffs allege that Defendants and the Fike Defendants filed a counterclaim based on  
5 accounting information they knew was incorrect and for which they had no legal basis.  
6 Plaintiffs allege that both the Fike Defendants and Defendants infringed on the same right - the  
7 right to be free of lawsuits based on knowingly false information. Simple put, both malicious  
8 prosecution causes of action concern Defendants' and the Fike Defendants' actions that resulted  
9 in the DDJ Entities filing a knowingly false and frivolous counterclaim. Thus, determining that  
10 Plaintiffs' malicious prosecution cause of action against Defendants must be decided the same as  
11 Plaintiffs' cause of action against the Fike Defendants is supported because the identity of the  
12 claims is the same.

13 **b. Final Judgment**

14 Had Judge Wanger merely dismissed the malicious prosecution claim against the Fike  
15 Defendants, it would be deemed an interlocutory order that would have no res judicata effect. See  
16 Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9<sup>th</sup> Cir.1983) (an unappealable decision  
17 is "not sufficiently firm to give it collateral estoppel effect"). However, besides dismissing the  
18 Fike Defendants, Judge Wanger entered final judgment pursuant to Rule 54(b) and the parties  
19 have appealed the dismissal. Because there was an entry of final judgment pursuant to Rule  
20 54(b), there has been a final judgment for claim preclusion purposes on the malicious  
21 prosecution claim against the Fike Defendants.

22 **c. Privity**

23 "Privity . . . is a legal conclusion designating a person so identified in interest with a party  
24 to former litigation that he represents precisely the same right in respect to the subject matter  
25 involved." F.T.C. v. Garvey, 383 F.3d 891, 897 (9<sup>th</sup> Cir. 2004); In Re Schimmels, 127 F.3d 875,  
26 881 (9<sup>th</sup> Cir. 1997). Privity is a flexible concept dependent on the particular relationship between  
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the parties in each individual set of cases. Garvey, 383 F.3d at 897. A non-party can be bound by the litigation choices made by his virtual representative only if certain criteria are met: “[A] close relationship, substantial participation, and tactical maneuvering all support a finding of virtual representation; identity of interests and adequate representation are necessary to such a finding.” Headwaters, 399 F.3d at 1053-54 (quoting Irwin v. Mascott, 370 F.3d 924 (9<sup>th</sup> Cir. 2004)). Examples of privity include:

(1) where a non-party has succeeded to a party's interest in property; (2) where a non-party controlled the original suit; (3) where the non-party's interests were adequately represented by a party in the original suit; (4) where there is a "substantial identity" between the party and the non-party; (5) where the non-party had a significant interest and participated in the prior action; (6) where the interests of the non-party and the party are so closely aligned as to be virtually representative; and (7) where there is an express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.

Garvey, 383 F.3d at 897 n.5; In re Schimmels, 127 F.3d at 881.

In this action, the complaint’s allegations show privity between the Fike Defendants and Defendants. The complaint alleges that Defendants controlled the litigation in Flores I, and Plaintiffs take the position that the Fike Defendants filed the counterclaim against Plaintiffs because Defendants told them to. Based on the complaint’s allegations, the Fike Defendants’ and Defendants’ interests are closely aligned for the purposes of defeating any malicious prosecution claim.<sup>2</sup> By claiming that they are entitled to the same outcome as the Fike Defendants, Defendants are essentially conceding that they should be held in privity to the Fike Defendants for the purposes of claim preclusion. The court agrees.

## 2. Plaintiff’s Position

Plaintiffs do not provide argument or legal authority on why the doctrine of claim preclusion should not apply to the malicious prosecution cause of action. Plaintiffs’ only real contention concerning the applicability of Judge Wanger’s ruling on the malicious prosecution cause of action is that Judge Wanger was incorrect and the issue is on appeal. Plaintiffs’

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<sup>2</sup> The court makes this finding based on the complaint’s allegations.



disagreement with Judge Wanger notwithstanding, it does not provide a basis for the court to find the current malicious prosecution cause of action against Defendants is not precluded by claim preclusion.

Finally, the court notes that in the opposition, Plaintiffs contend that DDJ, Inc's lack of corporate status during the trial in Flores I is another reason to find Defendants' actions in filing the counterclaim were malicious. This theory of malicious prosecution is not included in the complaint, and as such, cannot save this cause of action from dismissal. In addition, this theory was not raised in earlier complaints, and was not litigated between Plaintiffs and the Fike Defendants. Claim preclusion bars both relitigation of grounds of recovery that were asserted or could have been asserted earlier. See Tahoe-Sierra Preservation Council, 322 F.3d at 1078. Thus, it would be futile for the court to grant leave to amend the complaint to add this theory of liability because it is also barred by claim preclusion.

Accordingly, the malicious prosecution cause of action is subject to dismissal without leave to amend.

### **C. MALICIOUS USE OF PROCESS**

The basis of Plaintiffs' malicious use of process cause of action arises from the discovery that occurred during Flores I. Specifically, the complaint alleges that Tom Grainer, an employee of DDJ Entities, testified under oath that he observed Defendant Dennis Hagobian destroying documents. The complaint alleges that David R. Emerich, the DDJ Entities' attorney, wrote letters to Plaintiffs demanding payment. The complaint alleges that DDJ Entities required 53 cents per page to copy documents Plaintiffs requested as part of an accounting. The complaint alleges that David R. Emerich wrote a letter to Hemphill & Wilson Enterprises, Inc., who had contracted with Plaintiffs to pack their 1998 crop, stating that Plaintiffs owed the DDJ Entities money.

Defendants contend that Judge Wanger's orders, which dismissed the abuse of process



causes of action against the Fike Defendants, bar litigation of these issues against Defendants. Both the original complaint and amended complaint alleged an abuse of process cause of action against the Fike Defendants and other Defendants. On February 21, 2006, Judge Wanger found as follows:

Plaintiff's third cause of action is entitled "malicious use of process," but appears to be a claim for "abuse of process." The tort of abuse of process constitutes "the use of a legal process against another to accomplish a purpose for which it is not designed." *Drum*, 107 Cal. App. 4th at 1019. Its elements are: (1) "an ulterior motive;" and (2) "a willful act in the use of process not proper in the regular conduct of the proceedings." *Id.*

The essence of the tort 'abuse of process' lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice....

Here, Plaintiffs allege that the Fike Defendants abused legal process in several ways:

- (1) By attempting to charge Joe Flores \$0.53 per page for copying FMI's documents before the Flores filed suit;
  - (2) By sending correspondence to another packing agent, H&W, with an attached UCC-1 Financing Statement, notifying H&W that FMI had a secured interest in the Flores' 1998 apple crop based on an outstanding debt, thereby causing other packers to "blackball" the Flores';
  - (3) By failing to produce documents in discovery that the Fike Defendants later attempted to use at trial and by destroying (or somehow aiding or having knowledge of the destruction of) relevant documents that should have been preserved for discovery.
- (Compl. ¶¶180, 182, 184, 189-192, 196.)

#### **a. Applicability of the Anti-SLAP Statute.**

The Anti-SLAP statute has been applied to abuse of process claims where the underlying act arises from the exercise of the right to petition the courts for redress. *See Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1570 (2005)(reasoning that a cause of action for abuse of process is subject to the Anti-SLAP statute because "it arises from the exercise of the right of petition.").

The important question is whether the underlying act constitutes an exercise of the right of petition and/or invokes the court process. It is not so clear whether the Fike Defendants' initial demand that Plaintiffs pay \$0.53 per page to copy DDJ documents was made in connection with the underlying lawsuit. In other words, it is not clear that Plaintiff's conduct invoked any "process" of the court or implicated the Fike Defendants' right to petition the courts. The dispute over copy costs occurred before any lawsuit was filed. Nor is it clear whether a lawsuit was anticipated at that time. The copy charge complaint, if not connected with a lawsuit, cannot constitute "abuse of process." Giving Plaintiffs the benefit of the doubt on this point, even if Fike Defendants' attempt to collect \$0.53 per page for copying DDJ documents was made in anticipation of litigation, the Anti-SLAP statute would apply as the attempt to collect copying costs is an incident of the litigation process by which the Fike Defendants sought to defend DDJ before a court of law. Moreover, the Flores, as prevailing parties, could have

sought to recover excessive copying costs through a cost bill or otherwise addressed during the underlying lawsuit.

The Fike Defendants' mailing of the notice of secured interest to H&M is more closely connected to the Fike Defendants' right of petition. Communications made in anticipation of litigation may be protected by both the Anti-SLAP provision and the litigation privilege. *See Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) ("Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b)....such statements are equally entitled to the benefits of section 425.16."). The letter to H&M is a communication made in anticipation of litigation. It specifically puts another crop-lender/creditor that FMI/DDJ expects H&W to "honor and recognize the prior secured interest held by [FMI/DDC] in apple crops and proceeds otherwise belonging to Mr. Flores. In the event that [H&W] distributes proceeds without regard to the security interest of [FMI/DDJ] in those proceeds, [FMI/DDJ] will exercise all remedies available to it with respect to such conduct." (See Ex. B to Emerich Decl. (emphasis added)). The mailing of this letter is an act protected by the Anti-SLAP statute, as it is a conventional notice of the claim of a prior security interest in crops, which endeavored to protect the priority of that security interest and put the new lender on notice.

The allegations of discovery misconduct and the related destruction of evidence are also acts that fall within the scope of the Anti-SLAP statute.

Defendants have met their burden of establishing that the Anti-SLAP statute should apply to this cause of action.

#### **b. Applicability of the Litigation Privilege.**

Defendants assert generally that all of the acts which underlie the abuse of process claim are subject to the litigation privilege. As discussed above, the letter to H&M is a communication sent in anticipation of litigation to protect a claimed security interest, which naturally falls within the coverage of the litigation privilege. The applicability of the privilege to the other alleged acts is not so clear-cut. On the one hand, the attempt to charge the Flores' \$0.53 per page for copies is communicative, and arguably conduct: the act of demanding payment for copies. Similarly, the Fike Defendants alleged attempt to use documents at trial that were not produced at discovery and the Fike Defendants alleged involvement in the destruction of evidence is arguably conduct, not communication. However, such matters are inherently part of the discovery process and were redressible under discovery rules and should have been addressed during the underlying litigation.

Arguendo, even if the litigation privilege does not absolutely bar this claim, the conduct is not sufficiently described and not for a purpose the law intends to constitute abuse of process as opposed to alleged discovery abuse.

#### **c. Merits of the Abuse of Process Claim.**

Even if the litigation privilege does not apply, because the Anti-SLAP statute applies to all of the alleged acts underlying Plaintiff's abuse of process claim, Plaintiffs must establish a possibility of prevailing on an abuse of process claim based upon these facts. In other words, do these factual allegations set forth a prima facie claim of abuse of process. The elements of an abuse of process claim are: (1) "an ulterior motive;" and (2) "a willful act in the use of process not proper in the regular conduct of the proceedings."

The ulterior motive element can be inferred from proof of a willful improper act, *Drum*, 107 Cal. App. 4th, at 1020, so the critical question is whether

1 Plaintiffs have established a “willful act in the use of process not proper in the  
2 regular conduct of the proceedings.”

3 Put another way, to abuse process, a defendant must use court process for  
4 a purpose not intended, such as to obtain a collateral advantage. Plaintiffs’  
5 allegations are confusing, but it can be inferred from Plaintiffs’ submissions that  
6 in early 1998, the Flores began to suspect that DDJ was using inappropriate  
7 accounting practices to calculate the amount of moneys owed to the Flores’ for  
8 several years worth of apple crops. The Flores began to demand access to DDJ’s  
9 accounting records but were never satisfied with the manner and scope of access  
10 granted to those documents. The specific allegation of the Complaint is that costs  
11 were wrongfully demanded for copying these documents. The Flores believed  
12 they were entitled to copies of accounting for their crops, without having to pay  
13 for them. They allege that the Fike Defendants and DDJ believed (at least at the  
14 time) that defendants were entitled to be reimbursed for the costs of copying the  
15 documents. It also appears that the Flores’ and the Fike Defendants had numerous  
16 disagreements as to the time, manner, and method of access to the accounting  
17 documents.

18 Eventually, the Flores’ turned to the Marketing Enforcement Branch of the  
19 California Department of Food & Agriculture (“MEB”) to assist in resolving the  
20 disputes over access to the documents. Individuals at MEB appear to have  
21 corresponded with the Fike Defendants to direct the Fike Defendants’ attention to  
22 applicable regulations. These regulations required DDJ to afford the Flores’  
23 access to documents concerning the marketing of their fruit. This and other  
24 correspondence eventually resulted in an agreement that the Fike Defendants and  
25 DDJ would provide the Flores with copies of certain files. **Critically, however,**  
26 **nowhere in the complaint is it alleged that it was improper for the Fike**  
27 **Defendants to demand reimbursement for the costs of copying documents for**  
28 **the Flores.** Nor could it be. (It is also worth noting that the Fike Defendants ended  
up not charging the Flores’ \$0.53 per page.) Plaintiffs have made no allegation  
that the demand for copy cost reimbursement was “a willful act in the use of  
process not proper in the regular conduct of the proceedings.” Moreover, the issue  
could and should have been redressed at the underlying trial.

Even if the notice of secured interest sent to H&W was not a  
communication protected by the litigation privilege, the mailing of that notice  
which was a normal step a secured party takes to protect priority of a security  
interest and was not an abuse of process. Nothing submitted demonstrates that the  
Fike Defendants lacked probable cause to believe that the Flores’ actually owed  
money to FMI/DDJ pursuant to the promissory note and that a filed financing  
statement reflecting a security interest in the Flores’ crops had been granted and  
perfected. Sending notice of the second promissory note debt for crop loans along  
with a warning that FMI/DDJ would take steps to protect its security interest was  
a commercially reasonable and permissible action, unless Plaintiffs can allege  
contrary facts.

Although the Fike Defendants acknowledge that there were numerous  
discovery disputes during the Flores I litigation, nothing in the record indicates  
that the Fike Defendants engaged in “a willful act in the use of process not proper  
in the regular conduct of the proceedings.” In the hundreds of pages of  
submissions from the Flores regarding the instant motions, the alleged discovery  
violations are mentioned only a few times. Specifically, Joe Flores’ declaration, at  
paragraphs 60 and 61, states:

On January 14, 2003, after Fike, on numerous occasions  
declaring that there were no more documents in their care, custody

1 or control, suddenly by Court Order, manages to find numerous  
2 documents previously requested which he denied existed.  
[citations]

3 Accordingly, it is well documented and further evidenced  
4 that Defendants, David R. Emerich, Esq., and David A. Fike, Esq.,  
5 knew or should have known they were abusing the process since  
inception of this matter, which commenced on April 29, 1999  
[citation], and continued on through pre-trial discovery by the  
6 spoilation and concealment of evidence...

7 These conclusory allegations are insufficient to establish that the Fike  
8 Defendants willfully used "process not proper in the regular conduct of the  
9 proceedings." At most, they suggest a violation of civil discovery rules. Such a  
10 violation, on its own, does not constitute an abuse of process. Moreover, there  
11 were adequate remedies to enforce the discovery rules in the prior case. It is  
impermissible to sue for prior violations of discovery rules in a subsequent  
lawsuit. There are any number of legitimate (i.e., not improper) reasons why  
documents initially not disclosed might later be provided in discovery. This is the  
nature of civil litigation.

12 The Fike Defendants' motion to strike the third cause of action is  
13 GRANTED.

14 (Feb/21/06 Order at 25-32).

15 For the reasons discussed above, the court finds that claim preclusion bars re-litigation of  
16 the abuse of process cause of action for which judgment has been entered. The abuse of process  
17 cause of action against both the Fike Defendants and Defendants concern the alleged destruction  
18 of discovery documents, copy costs to review documents, and letters written by the Fike  
19 Defendants concerning amounts Plaintiffs allegedly owed. There is a final judgment on the  
20 merits of the abuse of process cause of action. The court further finds privity between  
21 Defendants and the Fike Defendants.

22 In addition, the abuse of process claims cause of action is based almost entirely on the  
23 conduct of the DDJ Entities and the DDJ Entities' attorneys, not Defendants. This alone is  
24 grounds to dismiss this claim.

25 Finally, Plaintiffs' basis for the abuse of process cause of action were raised and litigated  
26 in Flores I. To the extent discovery violations occurred, they were resolved by the Magistrate  
27 Judge and the undersigned. To the extent the DDJ Entities' employees' allegedly destroyed  
28 evidence, falsified records, and wrongly demanded money, these issues were also presented to

1 the jury during Flores I and used by Plaintiffs in Flores I to prove unlawful conduct by the DDJ  
2 Entities. These issues were redressed at the Flores I trial. Thus, Judge Wanger's earlier orders in  
3 this action and the litigation that occurred in Flores I bar Plaintiffs' abuse of process cause of  
4 action. This cause of action will be dismissed without leave to amend.

5  
6 **D. CONVERSION**

7 The complaint contains several events by Defendants that Plaintiffs allege show  
8 Defendants converted Plaintiffs' assets. The complaint alleges that on July 25, 2003, the jury in  
9 Flores I found that the DDJ Entities had converted property belonging to Plaintiffs. The  
10 complaint alleges that Defendants worked in an agency relationship as fiduciaries of the DDJ  
11 Entities. The complaint alleges that Defendants breached their fiduciary duty to the DDJ  
12 Entities by converting assets and property that were being held in trust by the DDJ Entities from  
13 the sale of Plaintiffs' fruit. The complaint alleges that Defendants paid themselves dividends  
14 from converted property belonging to Plaintiffs, made investments with Defendant Yosemite,  
15 and settled another civil lawsuit brought by T&T.

16 Defendants contend that Plaintiffs have not identified the property belonging to them that  
17 could be the subject of a conversion. Defendants argue that money alone cannot form the basis  
18 of a conversion cause of action.

19 "Conversion is the wrongful exercise of dominion over the property of another." Irving  
20 Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan, 129 Cal.App.4th 692, 699  
21 (2005). The elements of a conversion are: (1) the plaintiff's ownership or right to possession of  
22 the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or  
23 disposition of property rights; and (3) damages. Oakdale Village Group v. Fong, 43 Cal.App.4th  
24 539, 543-44 (1996); Hartford Financial Corp. v. Burns, 96 Cal.App.3d 591, 598 (1979). Money  
25 cannot be the subject of an action for conversion unless a specific sum capable of identification is  
26 involved. Haigler v. Donnelly, 18 Cal.2d 674, 681 (1941); Software Design & Application, Ltd.

1 v. Hoefer & Arnett, Inc., 49 Cal.App.4th 472, 485 (1996); Weiss v. Marcus, 51 Cal.App.3d 590,  
2 599 (1975). However, “it is not necessary that each coin or bill be earmarked.” Weiss, 51  
3 Cal.App.3d at 599.

4 Money can be the basis of a conversion claim when it is held on a plaintiff's behalf by  
5 another party as an agent or trustee. An agent, with knowledge of another's right to receive a  
6 specific amount of money, can be liable for conversion when he or she applies the money for his  
7 or her own use. Fischer v. Machado, 50 Cal.App.4th 1069, 1073 (1996). For example, in  
8 Fischer v. Machado, 50 Cal.App.4th 1069 (1996), the defendant accepted money as an agent for  
9 the plaintiff. The California Court of Appeal found that a conversion cause of action was  
10 available against the defendant-agent because he allegedly used the funds for its own benefit  
11 rather than paying the money to the plaintiff-principal. Id. at 1073-74. In Weiss v. Marcus, 51  
12 Cal.App.3d 590 (1975), the complaint alleged that the defendant attorneys, who had taken over  
13 representation of the plaintiff attorney's client, had received settlement money, distributed it to  
14 the client, and converted the amount of the plaintiff's lien to their own use. Id. at 595-96. The  
15 California Court of Appeal found his allegation was sufficient to state a cause of action for  
16 conversion. Id. at 559. In Watson v. Stockton Morris Plan Co., 34 Cal.App.2d 393 (1939), a  
17 savings and loan was held liable for conversion of a bank account where it issued a duplicate  
18 passbook and delivered the funds in the plaintiff's account to a third party. Noting that trover, or  
19 conversion, will not ordinarily lie to recover money deposited in a bank, the California Court of  
20 Appeal found the tort of conversion available because the “the bank wrongfully exercised  
21 dominion and control over not only the genuine pass book, but the account which it represents,  
22 and by discounting and cashing the account for a sum less than its real value, to the profit of the  
23 company.” Id. at 407.

#### 24 **1. Specific Funds**

25 Here, Plaintiffs have not alleged a specific sum that Plaintiffs were holding for them as a  
26 fiduciary. From the complaint, Plaintiffs' conversion theory appears to be based on the fact that  
27  
28



the DDJ Entities owed Plaintiffs money pursuant to the judgment in Flores I and Defendants converted money from the DDJ Entities' accounts, by virtue of their position as shareholders and directors of the DDJ Entities, that should have been given to Plaintiffs to pay off the Flores I judgment. Such a theory is an impermissible theory of conversion based on money. There is no allegation that the DDJ Entities gave money to Defendants to pay off the Flores I judgment. There is no allegation that Defendants ever acted as Plaintiffs' agent for which they were required to turn over the Flores I judgment. To the contrary, the complaint's allegations appear to allege that the DDJ Entities were without funds by the time Plaintiffs demanded the Flores I judgment. Thus, the complaint fails to allege that the DDJ Entities gave money to Defendants to satisfy the Flores I judgment. Plaintiffs provide no legal support for a conversion theory based on an individuals' conduct that results in a corporation lacking the funds it needs to pay a judgment. Thus, Plaintiffs' conversion cause of action must be dismissed.

## **2. Immediate Right to Possession**

The fact most of Defendants' alleged bad acts concerning their disposition of the DDJ Entities' assets appear to have taken place prior to the Flores I judgment is also fatal to Plaintiffs' conversion claim. The plaintiff's immediate right to possession of the property at the time of conversion is an element to be proven in the conversion case. Snapp & Associates Ins. Services, Inc. v. Malcolm Bruce Burlingame Robertson, 96 Cal. App. 4th 884, 892 n.2 (2002); Messerall v. Fulwider, 199 Cal.App.3d 1324, 1329 (1988). To the extent Defendants' alleged unlawful action is giving DDJ Entities' assets to Defendant Yosemite *before* the judgment in Flores I, Plaintiffs had no immediate right to possess the money at the time Plaintiffs allegedly converted it. This bars any conversion cause of action.

## **3. Defendants' Alleged Personal Conversion Based on Events in Flores I**

In their opposition, Plaintiffs appear to allege different facts in support of their conversion cause of action. Instead of focusing on Defendants' actions in taking money belonging to the DDJ Entities that should have been available to pay the Flores I judgment, the opposition focuses



1 on Defendants' alleged actions from 1995 through 1998, in which they did not pay Plaintiffs  
2 sums Plaintiffs were owed for fruit sales.

3 The court notes that in Fischer a commission merchant took funds received from the sale  
4 of consigned farm products, put them into a corporate account, and used them to pay operating  
5 expenses and repay loans. Fischer, 50 Cal.App.4th at 1071. When the farmers were not paid and  
6 sued for conversion, the California Court of Appeal concluded that the farmers had a common  
7 law conversion action against the agent "who commingled such proceeds with its general  
8 accounts and then went out of business." Id. Under Fisher and related cases, a merchant's  
9 failure to pay a farmer funds owed can be grounds for conversion. This is exactly the conversion  
10 claim that Plaintiffs succeeded on in Flores I.

11 Plaintiffs cannot now raise a conversion claim based on the same facts as litigated in  
12 Flores I against Defendants for several reasons. First, any conversion claim against Defendants  
13 based on conduct occurring in 1995 through 1998 is barred by the statute of limitations.  
14 Conversion is subject to a three-year statute of limitations. Cal.Civ.Pro. Code § 338; AmerUS  
15 Life Ins. Co. v. Bank of America, N.A., 143 Cal.App.4th 631, 639 (2006). Normally, "[t]he  
16 statute of limitations for conversion is triggered by the act of wrongfully taking property."  
17 AmerUS Life Ins., 143 Cal.App.4th at 639; Bono v. Clark, 103 Cal.App.4th 1409, 1433 (2002).  
18 However, when "the defendant in a conversion action fraudulently conceals the relevant facts or  
19 . . . fails to disclose such facts in violation of his or her fiduciary duty to the plaintiff," "the statute  
20 of limitations does not commence to run until the aggrieved party discovers or ought to have  
21 discovered the existence of the cause of action for conversion." AmerUS Life Ins., at 143  
22 Cal.App.4th at 639 (quoting Strasberg v. Odyssey Group, Inc., 51 Cal.App.4th 906, 915-16  
23 (1996)). Here, Plaintiffs clearly knew that the DDJ Entities and those employed by the DDJ  
24 Entities had converted their property by at least 1999, when Flores I was filed. Thus, assuming  
25 a conversion cause of action is available against Defendants as employees and agents of the DDJ  
26 Entities for events occurring in 1995 through 1999, it is barred by the statute of limitations.

Second, allowing litigation over whether Defendants, acting through the DDJ Entities, converted Plaintiffs' property in 1995 through 1998 would be duplicative of Flores I. The court has discretion to dismiss a duplicative complaint with prejudice to prevent a plaintiff from "fragmenting a single cause of action and litigating piecemeal the issues which could have been resolved in one action." Adams v. California Dept. of Health Services, 487 F.3d 684, 688 (9<sup>th</sup> Cir. 2007) (quoting Flynn v. State Bd. of Chiropractic Exam'rs, 418 F.2d 668, 668 (9<sup>th</sup> Cir.1969) (per curiam)). Based on the complaint's allegations, Defendants were employees, agents, directors, and shareholders of the DDJ Entities at the time of the events described in both Flores I and this action, and thus a second action against them based on what they did on behalf of the DDJ Entities is barred. See, e.g., Adams, 487 F.3d at 691 (finding employees of corporation in privity when employees submitted evidence in prior action and corporation's liability predicated on action's of employees). Thus, Plaintiffs' theory of conversion based on Defendants' actions in Flores I are subject to dismissal.

#### **4. Section 17200 and 17500 Violations**

In the opposition, Plaintiffs mention possible violations of California Business and Professions Code §§ 17200 and 17500 within their discussion of why the conversion cause of action should not be dismissed. Section 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1." Section 17500 prohibits false or misleading statements by any person, firm, corporation, association, or any employee thereof. Nothing in these statutes nor Plaintiffs' opposition brief explains how these two Sections support a cause of action against Defendants for conversion. In addition, neither of these Sections is mentioned in the complaint or listed as a cause of action. Thus, the court will spend no further time addressing Plaintiffs' reference to these Sections to support a conversion cause of action.

#### **5. Amendment**

The court recognizes that when dismissing a complaint, the Ninth Circuit has stated that

“leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts.” Bly-Magee v. California, 236 F.3d 1014, 1019 (9<sup>th</sup> Cir.2001) (internal quotation marks omitted); Chang v. Chen, 80 F.3d 1293, 1296 (9<sup>th</sup> Cir. 1996). Here, the court is aware of no facts that could be alleged that would provide Plaintiffs with a conversion cause of action against Defendants based on either Defendants’ conduct in 1995 through 1999 or their alleged conduct in dissipating the DDJ Entities’ assets. Thus, the conversion cause of action will be dismissed without leave to amend.

## **E. RICO**

Defendants contend that the complaint does not state a claim for a RICO violation. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, creates a civil cause of action for “[a]ny person injured in his business or property by reason of a violation of section 1962.” Beck v. Prupis, 529 U.S. 494, 495 (2000) (quoting section 1964(c)). Title 18 U.S.C. § 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). To state a claim under 18 U.S.C. § 1962(c), a plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985); Odom v. Microsoft Corp., 486 F.3d 541, 547 (9<sup>th</sup> Cir. 2007).

### **1. Statute of Limitations**

A civil RICO action is governed by the four-year statute of limitations borrowed from the Clayton Act. Rotella v. Wood, 528 U.S. 549, 553 (2000); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987). “The limitations period for civil RICO actions begins to run when a plaintiff knows or should know of the injury which is the basis for the action. Thus, Plaintiffs’ RICO claims accrued when Plaintiffs had actual or constructive

1 knowledge of [Defendant's] fraud.” Living Designs, Inc. v. E.I. Dupont de Nemours and Co.,  
 2 431 F.3d 353, 365 (9<sup>th</sup> Cir. 2005). A plaintiff may be deemed to have constructive knowledge  
 3 of the injury when it had enough information to warrant an investigation which, if reasonably  
 4 diligent, would have led to discovery of the injury. Id. at 365; Pincay v. Andrews, 238 F.3d  
 5 1106, 1110 (9<sup>th</sup> Cir. 2001). The statute of limitations does not wait to accrue when the plaintiff  
 6 knew or should have known of the last predicate act, which is part of the same pattern of  
 7 racketeering activity. Klehr v. A.O. Smith Corp., 521 U.S. 179, 186-87 (1997). The “discovery  
 8 of the injury, not discovery of the other elements of a claim, is what starts the clock.” Rotella,  
 9 528 U.S. at 555. It is clear that there is no last predicate act rule under which recovery can be  
 10 had for injuries predating the four year period even if at least one predicate act was committed  
 11 within it. Klehr, 521 U.S. at 186-87.

12 The RICO cause of action is divided up into several predicate acts. For the purposes of  
 13 the statute of limitations analysis, the court will review the predicate acts based on the time frame  
 14 in which they were alleged to occur.

15 **a. Acts Accruing Between 2001 and 2005**

16 Predicate Act Two alleges mail and wire fraud. The Second Part of Predicate Act Two  
 17 concerns Defendant Yosemite’s and Defendant Rod Christiansen’s use of the United States Mail  
 18 and wire service to transfer information concerning the capital infusion into Defendant Yosemite.  
 19 The complaint is unclear as to the exact time frame in which Defendants used the mail and wire  
 20 to transfer information about Defendant Yosemite. To the extent such mail and wire transfers  
 21 occurred within four years from the filing date of this action, these mail and wire frauds are not  
 22 barred by the statute of limitations.

23 Predicate Act Three alleges interstate and foreign travel to aid in racketeering. Plaintiffs  
 24 allege that Defendants used travel in interstate and foreign commerce, including postal services  
 25 and internet services, to distribute proceeds that Defendants unlawfully converted from Plaintiffs.  
 26 This claim appears to be premised on Plaintiff’s allegations that at some time after 1999,  
 27  
 28

1 Defendants unlawfully converted the property of DDJ, Inc. and DDJ LLC for their own purposes,  
2 including funding Defendant Yosemite. The complaint is unclear as to the exact time frame of  
3 Defendants' travel to aid in racketeering. To the extent such travel occurred within four years  
4 from the filing date of this action, this predicate act is not barred by the statute of limitations.<sup>3</sup>

5 Predicate Act Four alleges laundering of monetary instruments. The Second Part of  
6 Predicate Act Four alleges that Defendants unlawfully converted the money Plaintiffs were owed  
7 from Flores I into Defendant Yosemite. The complaint is unclear as to the exact time frame of  
8 Defendants' alleged laundering of money by converting the money Plaintiffs were owed from  
9 Flores I into Defendant Yosemite. To the extent such laundering occurred within four years  
10 from the filing date of this action, it is not barred by the statute of limitations.

11 Predicate Act Five alleges that Defendants engaged in monetary transactions in property  
12 derived from unlawful activity. Plaintiffs allege that Defendants converted money owed by the  
13 DDJ Entities as an investment and capital infusion into Defendant Yosemite to avoid paying  
14 Plaintiffs the money owed from Flores I. As with the other allegations concerning Defendants'  
15 actions in taking the money held by DDJ Entities that should have been used to pay the verdict in  
16 Flores I, the complaint is unclear as to the exact time frame of Defendants' alleged money  
17 transfers. To the extent such transactions occurred within four years from the filing date of this  
18 action, they are not barred by the statute of limitations.

19 Predicate Act Seven alleges the receipt of income derived, directly or indirectly, from a  
20 pattern of racketeering activity or through collection of an unlawful debt. While the exact basis  
21 of this act is unclear, it appears to be based on Yosemite's continued use of money obtained by  
22 Defendants' alleged unlawful conduct. To the extent Plaintiffs are alleging the receipt of  
23 income occurred within four year of the filing of this action, these acts are not barred by the  
24 statute of limitations.

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26 <sup>3</sup> However, this predicate act is subject to dismissal without leave to amend for the  
27 reasons set forth below.

1           **b. Acts Accruing Prior to 2001**

2           Plaintiffs may not recover damages based on some of the predicate acts listed in the  
3 complaint because they occurred outside the statute of limitations. Predicate Act One alleges  
4 theft from interstate shipments occurred. As support for Predicate Act One, Plaintiffs allege that  
5 between 1995 and 1999, Defendants were involved in shipping stolen fruits and vegetables.  
6 Because this occurred more than four years before this action was filed, damages from this  
7 predicate act are prohibited. Predicate Act Two alleges mail and wire fraud. The complaint  
8 alleges that Defendants in their roles and involvements periodically used the United States Mail  
9 and fax machines to send fraudulent information concerning monies owed to Plaintiffs. These  
10 acts occurred between 1995 and 1999, when Defendants allegedly gave Plaintiffs false  
11 information, and Plaintiffs not recover damages. Predicate Act Three alleges interstate foreign  
12 travel to aid in racketeering. As noted above, the complaint is unclear as to when Defendants  
13 traveled to aid their racketeering. Acts prior to 2001 are be barred under the statute of  
14 limitations. Predicate Act Four alleges laundering of monetary instruments. The First Part of  
15 Predicate Act Four alleges that money belonging to Plaintiffs was maliciously converted by the  
16 DDJ Entities. The DDJ Entities' act of converting Plaintiff's property occurred between 1995  
17 and 1999, and it is thus barred by the statute of limitations. Predicate Act Six alleges trafficking  
18 in counterfeit goods. Defendants' alleged acts of misbranding fruit clearly occurred between  
19 1995 and 1999. Thus, damages for this act are barred by the statute of limitations.

20           **c. Fraudulent Concealment**

21           In their opposition, Plaintiffs contend that the predicate acts occurring outside the statute  
22 of limitations are not barred by the four year statute of limitations based on the doctrine of  
23 fraudulent concealment. The Supreme Court has left unsettled the question of whether equitable  
24 principles of tolling apply to RICO as they do to other federal statutes of limitation. Rotella, 528  
25 U.S. at 560-61. However, in the Ninth Circuit, the equitable doctrine of fraudulent concealment  
26 "is read into every federal statute of limitation." Thorman v. Am. Seafoods Co., 421 F.3d 1090,  
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1 1095 n. 4 (9<sup>th</sup> Cir. 2005) (quoting Holmberg v. Armbrrecht, 327 U.S. 392, 397 (1946)). And, the  
2 Ninth Circuit applies the doctrine of fraudulent concealment to RICO claims. See Pincay, 238  
3 F.3d at 1110; Grimmett v. Brown, 75 F.3d 506, 514 (9<sup>th</sup> Cir. 1996).

4 “The doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and  
5 proves that the defendant actively misled her, and that she had neither actual nor constructive  
6 knowledge of the facts constituting his cause of action despite her due diligence.” Grimmett v.  
7 Brown, 75 F.3d 506, 514 (9<sup>th</sup> Cir. 1996). To establish fraudulent concealment, the plaintiff  
8 carries the burden of proving that (1) the defendant affirmatively misled the plaintiff as to the  
9 operative facts that gave rise to the claim, and (2) the plaintiff had neither actual nor constructive  
10 knowledge of these operative facts despite his diligence in trying to uncover them. Thorman,  
11 421 F.3d at 1094. Merely keeping someone in the dark is not the same as affirmatively  
12 misleading the plaintiff. Id. at 1095-96. The plaintiff must establish “affirmative conduct upon  
13 the part of the defendant which would, under the circumstances of the case, lead a reasonable  
14 person to believe that he did not have a claim for relief.” Pincay, 238 F.3d at 1110; Volk v. D.A.  
15 Davidson & Co., 816 F.2d 1406, 1415 (9<sup>th</sup> Cir. 1987). A plaintiff who is not reasonably diligent  
16 may not assert fraudulent concealment. Klehr, 521 U.S. at 194.

17 To succeed on Plaintiffs’ fraudulent concealment arguments, Plaintiffs would have to  
18 show that they did not know about the claims accruing prior to 2001, despite their diligence,  
19 because of Defendants’ concealment. Plaintiffs contend that Predicate Act One, theft from  
20 interstate shipments, is supported by the jury verdict in their favor on July 25, 2003, finding that  
21 DDJ, Inc. and DDJ LLC had converted Plaintiffs’ apples for their own use. Plaintiffs contend  
22 that based on the doctrine of fraudulent concealment, these claims did not accrue until the jury  
23 returned a verdict in Plaintiff’s favor in 2003. Plaintiffs also appear to allege that the First Part  
24 of Predicate Act Two, alleging mail and wire fraud concerning monies owed as part of the fruit  
25 packing, the First Part of Predicate Act Four, alleging laundering of monetary instruments by  
26 converting the DDJ Entities’s funds, and Predicate Act Six, alleging trafficking in counterfeit  
27  
28



goods, were somehow also not known until within the limitations' period.

The complaint does not allege fraudulent concealment. There simply is no concealment where Plaintiffs knew or should have known about the facts allegedly underlying the claims at issue. The very conduct at issue in these acts was known by 1999, and in fact, Flores I was based, in part, on this conduct. The mere fact that Plaintiffs did not know this conduct was also a RICO violation and/or tactically decided not to include a RICO cause of action in Flores I does not meet the standard for fraudulent concealment. The claims arising between 1995 and 1999, which concern alleged unlawful conduct in packing fruit and incorrect payments to Plaintiffs, were known by Plaintiffs long before the statute of limitations began to run in 2001. Because these events were clearly known to Plaintiffs earlier, the court finds that Plaintiffs will never be able to obtain damages for these predicate acts based on the doctrine of fraudulent concealment. Accordingly, leave to amend these events will not be granted. See Bly-Magee, 236 F.3d at 1019 (“leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts”).

The court notes that Plaintiffs appear to argue that Predicate Act Three, alleging interstate and foreign travel prior to 2001, was also not known until within the limitations period. This Predicate Act is based on Defendants' actions in dissolving the DDJ Entities as part of the pattern or racketeering. Based on the complaint, any such travel prior 2001 is barred under the statute of limitations. The complaint does not sufficiently allege fraudulent concealment for this predicate act. However, unlike the acts concerning fruit packing and payments, the court cannot say that no fraudulent concealment allegation could be made by the addition of other facts. See Bly-Magee, 236 F.3d at 1019. While the court would normally give Plaintiffs leave to amend Predicate Act Three to show fraudulent concealment, for the reasons discussed below, the predicate act is subject to dismissal for failing to state a violation of the Travel Act.<sup>4</sup>

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<sup>4</sup> The use of acts occurring outside the statute of limitations as predicate acts to establish a pattern of racketeering is discussed below in “Section D, 3, a”.

## 2. Enterprise

Defendants contend that the complaint fails to make the connection in continuity and relationship between the acts of the Defendants to meet the enterprise element of RICO. Plaintiffs do not respond to Defendants' contentions concerning the complaint's failure to adequately allege an enterprise. The complaint alleges that the enterprise consists of individuals associated-in-fact and they are not a legal entity.

Title 18 U.S.C. § 1961(4) defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." "As is evident from the text, this definition is not very demanding. A single 'individual' is an enterprise under RICO. Similarly, a single 'partnership,' a single 'corporation,' a single 'association,' and a single 'other legal entity' can all enterprises." Odom, 486 F.3d at 548. To allege the last category, an associated-in-fact enterprise, the plaintiff must allege three elements. First, the plaintiff must allege that the defendants associated for "a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981); Odom, 486 F.3d at 552. Second, the plaintiff must allege an "ongoing organization," either "formal or informal." Turkette, 452 U.S. at 583; Odom, 486 F.3d at 552. An ongoing organization is a vehicle for the commission of two or more predicate crimes. Odom, 486 F.3d at 552. Third, the plaintiff must allege facts that, if proved, provide sufficient "evidence that the various associates function as a continuing unit." Turkette, 452 U.S. at 583; Odom, 486 F.3d at 552. While every member need not be involved in each of the underlying acts of racketeering, the continuity requirement requires the associates behavior to be ongoing rather than isolated activity. Odom, 486 F.3d at 552. An associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise. Id. at 551.

### **a. Common Purpose**

To find Plaintiffs have alleged an associated-in-fact enterprise, the court must first

determine whether Plaintiffs have sufficiently alleged that Defendants associated for “a common purpose of engaging in a course of conduct.” According to the complaint, Defendants had the common purpose of defrauding Plaintiffs and converting Plaintiffs’ property for a capital infusion into Defendant Yosemite. Defendants furthered this common purpose by creating sham corporations to perpetrate fraud, breach contracts, and convert property and assets for their own selfish gain. Under the standard set forth in Odom, these allegations are adequate to allege that Defendants had a common purpose of creating sham companies that were used to convert Plaintiff’s property through fraudulent means.

**b. Ongoing Organization**

As set forth in Odom, a Plaintiff must show an “ongoing organization is a vehicle for the commission of two or more predicate crimes.” Odom, 486 F.3d at 552. According to Plaintiffs, Defendants worked over many years to use sham corporations to defraud and convert assets for the benefit of Defendant Yosemite and Defendants. Whether the complaint sufficiently alleges two or more predicate crimes is discussed below. However, for the purposes of the enterprise requirement, the complaint sufficiently alleges an ongoing organization.

**c. Continuing Unit**

Finally, Plaintiffs must allege facts that, if proved, provide sufficient “evidence that the various associates function as a continuing unit.” Turkette, 452 U.S. at 583. Here, Plaintiffs have alleged that Defendants acts were ongoing and not an isolated activity. Defendants’ alleged actions to defraud Plaintiffs and convert Plaintiffs’ money allegedly happened over many years and Defendants not only committed fraud and conversion when packing Plaintiffs’ fruit, Defendants allegedly continued to commit fraud and converted Plaintiffs’ assets when they dissolved corporations owning money to Plaintiffs and made litigation decisions that left these corporations without funds. The complaint alleges Defendants’ RICO conduct began in 1995 and continued until June 2003. This seven-year time span is adequate to establish that Defendants functioned as a continuing unit.

1 Thus, the complaint's allegations allege an enterprise.

2 **3. Racketeering Activity**

3 Defendants next contend that the complaint fails to allege racketeering activity. RICO  
4 violations under § 1962(c) require a "pattern of racketeering activity." 28 U.S.C. § 1962(c). The  
5 RICO statute defines a "pattern of racketeering activity" to be "at least two acts of racketeering  
6 activity, one of which occurred within ten years (excluding any period of imprisonment) after the  
7 commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Title 18 U.S.C. §  
8 1961(1) defines what acts will be considered acts of "racketeering activity."

9 **a. Predicate Act One – Theft of Interstate and Foreign Shipments in Violation of 18**  
10 **U.S.C. § 659**

11 Theft of interstate shipments in violation of 18 U.S.C. § 659 can serve as a predicate act  
12 of racketeering. See 18 U.S.C. § 1961(1). Title 18 U.S.C. § 659 prohibits embezzlement,  
13 stealing, and unlawfully taking, carrying away, or concealment, with intent to convert to his or  
14 her own use, any goods or chattels moving as or which are a part of or which constitute an  
15 interstate or foreign shipment of freight, express, or other property. As support for this predicate  
16 act, Plaintiffs allege that between 1995 and 1999, Defendants were involved in shipping stolen  
17 fruits and vegetables. Plaintiffs contend that this predicate act is supported by the jury verdict  
18 in their favor on July 25, 2003, finding that DDJ, Inc. and DDJ LLC converted Plaintiffs' fruit  
19 for their own use.

20 **i. Statute of Limitations**

21 Defendants contend that this predicate act is barred by the statute of limitations.  
22 Defendants provide no authority that an act falling within the ten year pattern of racketeering but  
23 not within the statute of limitations cannot serve as a predicate act. Such an argument is not  
24 supported by the rule that the statute of limitations looks to the discovery of injury, not the date  
25 of the predicate acts. See Rotella, 528 U.S. at 555; Klehr, 521 U.S. at 186-87. As discussed  
26 above, this act is barred by the statute of limitations and Plaintiffs may not seek damages from  
27

1 this Predicate Act nor may they contend that this act serves as an accrual date for the statute of  
2 limitations. However, Plaintiffs may still use this act to show a pattern of racketeering. Absent  
3 authority to the contrary, the court finds that the fact a predicate act did not occur within four  
4 years from the accrual date does not bar the use of the act as a predicate act to show a pattern of  
5 racketeering because a pattern the racketeering requires two or more predicate acts within ten  
6 years, not four years.

7 ii. Failure to State a Claim for Theft of Shipments

8 Regardless of Defendants' statute of limitations argument, Defendants next contention for  
9 dismissal is persuasive. The basis of Predicate Act One is the jury's verdict in Flores I, which  
10 found that DDJ, Inc. and DDJ LLC converted apples. However, DDJ, Inc. and DDJ LLC are  
11 neither Defendants to this action nor alleged members of the enterprise. The complaint fails to  
12 link the Defendants in this action to the jury's findings that DDJ, Inc. and DDJ LLC converted  
13 Plaintiffs' property. The court's finding in Flores I that the named Defendants in this action are  
14 not DDJ, Inc.'s and DDJ LLC's alter egos in Flores I precludes Plaintiffs from being able to  
15 allege these Defendants stole the property at issue in this predicate act based on the complaint's  
16 allegations. Thus, this predicate act will be dismissed.

17 The court recognizes that in the complaint, Plaintiffs allege that Defendants are the agents  
18 for the DDJ Entities. As such, it is possible that Plaintiffs could allege that Defendants, as the  
19 agents for DDJ Entities, committed the thefts at issue in Flores I. While such a claim may state  
20 a predicate act, the court finds that claim preclusion bars such a predicate act because it could  
21 have been raised in Flores I. The complaint alleges that the theft claim is identical to the  
22 conversion claim in Flores I, the complaint alleges there is a final judgment in Flores I, and the  
23 complaint alleges that there was privity between the DDJ Entities and Defendants. Thus, this  
24 predicate act is barred by claim preclusion. See Western Radio Services Co., Inc. v. Glickman,  
25 123 F.3d 1189, 1192 (9<sup>th</sup> Cir.1997).

26 Even if claim preclusion does not bar such a cause of action, the court finds, in its  
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discretion, such a claim is duplicative of Flores I. The conversion claim in Flores I and the theft predicate act against Defendants share a common transactional nucleus of facts. In addition, Plaintiffs themselves allege privity between the Flores I defendants and Defendants. See, e.g., Adams, 487 F.3d at 691 (finding employees of corporation in privity when employees submitted evidence in prior action and corporation's liability predicated on action's of employees); Irwin, 370 F.3d at 930-31 (finding senior corporate officer virtually represented by his corporation). Thus, assuming a theft predicate act is available based on a theory that Defendants acted as the DDJ Entities' agents when committing the thefts at issue in Flores I, the court finds such a predicate act is barred because it should have been raised in Flores I. Accordingly, the court will not give leave to amend Predicate Act One.

**b. Predicate Act Two -- Mail Fraud and Wire Fraud**

Defendants contend that the complaint does not allege a predicate act of mail or wire fraud. Mail fraud in violation of 18 U.S.C. § 1341 can serve as a predicate act. See 18 U.S.C. § 1961(1). Section 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . . .

18 U.S.C. § 1341. Wire fraud may also serve as a predicate act. See 18 U.S.C. § 1961(1). Title 18 U.S.C. § 1343 reads, in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any

writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, . . . .

The complaint alleges that Defendants, in their roles and involvements, periodically used the United States Mail or fax machines to send accounting information, including checks, downward price adjustments, billing invoices, bills of hading, growers statements, growers history reports, interest rates, interest rates charged, pack-out reports, re-pack reports, and other information to packers, Plaintiffs, and other members of the public. The complaint alleges that these accountings are regulated and Defendants failed to include information required by law. Specifically, the complaint alleges that Defendants would prepare fraudulent weekly statements and checks and place them in the mail and/or fax them to Plaintiffs, Defendants would then confirm the fraudulent statements and checks over the phone when Plaintiffs questioned the amount, and Defendants would later fax documents containing false information as part of the discovery in Flores I. The complaint also alleges that Defendant Yosemite and Defendant Christiansen used the United States Mail and wire service to transfer information concerning the capital infusion into Defendant Yosemite.

*i. Statute of Limitations*

Defendants contend that other than the mail and wire uses involving Defendant Yosemite, these acts are barred by the statute of limitations. As discussed above, the statute of limitations looks to the discovery of the injury, not the date of predicate acts. An act may serve as a predicate act if it falls within ten years of another predicate act even if the act does not fall within the statute of limitations. While the alleged wire and mail frauds occurring between 1995 and 1999 may serve as predicate acts, Plaintiffs may not seek damages from these alleged predicate acts because any cause of action based on these acts did not accrue within the limitations period. Plaintiffs may only use these acts to show a pattern of racketeering.

To the extent Plaintiffs can allege in any amended complaint that Defendant Yosemite's and Defendant Rod Christiansen's use of the United States Mail and wire service to transfer



1 information concerning the capital infusion into Defendant Yosemite occurred within the statute  
2 of limitations, damages for these actions are not barred by the statute of limitations.

3 ii. Failure to State a Claim for Mail or Wire Fraud

4 Defendants contend that complaint fails to meet Rule 9(b) of the Federal Rule of Civil  
5 Procedure's requirement that allegations of fraudulent mail and wire transfers must be alleged  
6 with particularity. "[A] wire fraud violation consists of (1) the formation of a scheme or artifice  
7 to defraud; (2) use of the United States wires or causing a use of the United States wires in  
8 furtherance of the scheme; and (3) specific intent to deceive or defraud." Odom v. Microsoft  
9 Corp., 486 F.3d 541, 554 (9<sup>th</sup> Cir. 2007); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806  
10 F.2d 1393, 1400 (9<sup>th</sup> Cir.1986). A mail fraud violation requires the plaintiff to show that "(1) the  
11 defendants formed a scheme or artifice to defraud; (2) the defendants used the United States  
12 mails or caused a use of the United States mails in furtherance of the scheme; and (3) the  
13 defendants did so with the specific intent to deceive or defraud." Miller v. Yokohama Tire  
14 Corp., 358 F.3d 616, 620 (9<sup>th</sup> Cir. 2004); Schreiber, 806 F.2d at 1400. Portions of the elements  
15 of mail fraud and wire fraud must be alleged with particularity as required by Rule 9 of the  
16 Federal Rules of Civil Procedure.

17 To the degree that the first requirement--the formation of a scheme or artifice to  
18 defraud--requires a showing of the defendants' state of mind, general rather than  
19 particularized allegations are sufficient. Similarly, the third requirement--specific  
20 intent to deceive or defraud--requires only a showing of the defendants' state of  
mind, for which general allegations are sufficient. The only aspects of wire fraud  
that require particularized allegations are the factual circumstances of the fraud  
itself.

21 Odom, 486 F.3d at 554.

22 Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pled with  
23 particularity. It provides: "In all averments of fraud . . . , the circumstances constituting fraud . . .  
24 shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a  
25 person may be averred generally." Fed.R.Civ.Pro. 9(b). "Rule 9(b) requires the identification of  
26 the circumstances constituting fraud so that the defendant can prepare an adequate answer from  
27  
28

1 the allegations.” Odom, 486 F.3d at 553, 555. “The pleader must state the time, place, and  
 2 specific content of the false representations as well as the identities of the parties to the  
 3 misrepresentation.” Odom, 486 F.3d at 553-54; Schreiber Distrib, 806 F.2d at 1401. “While the  
 4 factual circumstances of the fraud itself must be alleged with particularity, the state of mind--or  
 5 scienter--of the defendants may be alleged generally.” Odom, 486 F.3d at 553-54; In re GlenFed,  
 6 Inc. Sec. Litig., 42 F.3d 1541, 1547 (9<sup>th</sup> Cir.1994) (en banc).

7 The complaint’s allegations concerning Defendants’ use of the United States Mail and  
 8 wire service to transfer information concerning the accountings and capital infusion into  
 9 Defendant Yosemite are not specific enough to meet Rule 9’s standards. The complaint does not  
 10 allege the time or place of the alleged fraudulent communications. The complaint does not  
 11 allege the content of the false representations. The complaint does not allege to whom the  
 12 misrepresentations were made. Finally, the complaint does not allege the identities of the  
 13 parties to the misrepresentation. It is unclear if only Defendant Christensen made the false  
 14 representations or if other Defendants also made misrepresentations. Thus, the mail and wire  
 15 fraud predicate act must be dismissed. Because it may be possible to cure this defect of Rule 9,  
 16 this predicate act will be dismissed with leave to amend.

17 **c. Predicate Act Three – Interstate and Foreign Travel To Aid a Racketeering**  
 18 **Enterprise**

19 The complaint alleges that Defendants traveled to aid in their racketeering enterprise.  
 20 Title 18 U.S.C. §1952(a), also known as the Travel Act, prohibits a person from traveling in  
 21 interstate or foreign commerce or using the mail in interstate or foreign commerce, with intent to:

- 22 (1) distribute the proceeds of any unlawful activity; or
- 23 (2) commit any crime of violence to further any unlawful activity; or
- 24 (3) otherwise promote, manage, establish, carry on, or facilitate the  
 promotion, management, establishment, or carrying on, of any unlawful  
 activity,

25 and thereafter performing or attempting to perform an act described in paragraphs (1), (2) or (3).

26 18 U.S.C.A. § 1952(a). In order to prove a violation of 18 U.S.C. § 1952, the plaintiff must

show that the defendant: (1) traveled in interstate commerce with the intent to promote an unlawful activity, and (2) committed an overt act in furtherance of that activity. See United States v. Stafford, 831 F.2d 1479, 1482 (9<sup>th</sup> Cir. 1987). The Travel Act requires only proof of a subsequent overt act in furtherance of the unlawful activity, and it does not require proof that the defendants performed or attempted to perform the activity they were planning at the time of the travel. See United States v. Winslow, 962 F.2d 845, 852 (9<sup>th</sup> Cir.1992). The purpose of Section 1952 is to deny individuals who act for a criminal purpose access to the channels of commerce. Erlenbaugh v. United States, 409 U.S. 239, 246 (1972); United States v. Stafford, 831 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1987).

As to Predicate Act Three, the complaint alleges that Defendants traveled in interstate and foreign commerce and used the postal services and internet serves to distribute the proceeds that were unlawfully converted by Defendants from the DDJ Entities. The complaint alleges that the funds obtained from the DDJ Entities and used as a capital infusion into Defendant Yosemite have now “gone global with the product Defendant Yosemite is presently marketing.”

The Travel Act requires an “unlawful activity”. The “unlawful activity” required for a Travel Act violation may be based upon a violation of certain state laws. “Unlawful activity” is defined as:

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances . . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title . . . .

18 U.S.C.A. § 1952(b)(ii). The court has reviewed the complaint’s allegations and concludes that Plaintiffs’ Travel Act violation is premised on some un-named Defendants traveling with the intent to convert amounts the DDJ Entities owed Plaintiffs. The complaint alleges the travel being done was to convert assets, as alleged in the second cause of action. In other words, the “unlawful activity” at issue in the alleged Section 1952 predicate act is Defendants’ conversion.

1 The second cause of action for conversion alleges a violation of California tort law. California  
2 tort laws dealing with conversion are not considered an “unlawful activity” within the meaning of  
3 Section 1952. Thus, the complaint fails to state a predicate act for a violation of the Travel Act.

4 In addition, even assuming conversion could serve as the basis for the “unlawful activity”  
5 Defendants traveled to distribute, the complaint does not allege a viable conversion cause of  
6 action. If the alleged unlawful activity turns out not to be a violation of state law, there is no  
7 violation of the Travel Act. See United States v. Brown, 505 F.2d 261 (4<sup>th</sup> Cir. 1974). For  
8 example, in Brown, the defendant was charged with traveling in interstate commerce and using  
9 interstate facilities with the intent to carry on an unlawful activity; The unlawful activity being  
10 giving and receiving bribes in violation of West Virginia law. Id. at 262 . When the West  
11 Virginia Supreme Court held that there had not been a violation of its law because the person  
12 allegedly bribed was not subject to accepting a bribe under the West Virginia law at issue, the  
13 Fourth Circuit found that the defendant’s conviction for violating Section 1952 could not stand.  
14 Here, the court has concluded that the complaint fails to allege any Defendant committed a  
15 conversion of Plaintiffs’ money. As such, it is impossible for Plaintiffs to allege a violation of  
16 Section 1952 because there is no sustainable allegation of an “unlawful activity”, conversion.  
17 Thus, to the extent Plaintiff’s Section 1952 predicate act is based on conversion, Plaintiffs have  
18 failed to state a claim.

19 Because the tort of conversion cannot serve as the “unlawful activity,” allowing Plaintiffs  
20 the opportunity to amend would be futile. In addition, the court has concluded that Plaintiffs  
21 would be unable to state a claim for conversion even if leave to amend were given. Thus, leave  
22 to amend Predicate Act Three will not be granted.<sup>5</sup>

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25 <sup>5</sup> To the extent Plaintiffs believe Defendants committed another "unlawful activity" as  
26 defined by Section 1952(b), Plaintiff may request leave to file an amended complaint containing  
27 such a claim, along with a showing that such activity can serve as the basis for a Travel Act  
violation.

1 *d. Predicate Act Four – Laundering of Monetary Instruments in Violation of 18*  
 2 *U.S.C. § 1956(a)(1)*

3 Title 18 U.S.C. § 1956(a)(1) prohibits a defendant, knowing that property involved in a  
 4 financial transaction represents the proceeds of some form of unlawful activity, to conduct or  
 5 attempt to conduct financial transactions which in fact involve the proceeds of specified unlawful  
 6 activity, with the intent to promote the carrying on of the specified unlawful activity. To show  
 7 money laundering under 18 U.S.C. § 1956(a)(1), the plaintiff must prove that the defendant: (1)  
 8 engaged in a financial transaction which involved proceeds from specified illegal activity; (2)  
 9 knew the proceeds were from illegal activity; and (3) intended the transaction either to promote  
 10 the illegal activity or to conceal the nature, source, or ownership of the illegal proceeds. United  
 11 States v. Marbella, 73 F.3d 1508, 1514 (9<sup>th</sup> Cir. 1996).

12 The complaint alleges that the Defendants converted money, as alleged in the second  
 13 cause of action, and Defendants invested the money into Defendant Yosemite, which constitutes  
 14 a specific unlawful activity. The complaint states that additional specified unlawful activities  
 15 include robbery, theft from interstate shipments, mail fraud, wire fraud, racketeering, laundering  
 16 of investments, monetary transactions of property, and trafficking in counterfeit goods.

17 *i. Conversion*

18 A Section 1956 violation requires proceeds from some “unlawful activity.” As used in  
 19 Section 1956, “the term ‘knowing that the property involved in a financial transaction represents  
 20 the proceeds of some form of unlawful activity’ means that the person knew the property  
 21 involved in the transaction represented proceeds from some form, though not necessarily which  
 22 form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of  
 23 whether or not such activity is” a specified illegal activities. 18 U.S.C. § 1956(c)(1). There are  
 24 no allegations that the conversion alleged in the complaint is a felony under state or federal law.  
 25 In addition, the *tort* of conversion is clearly not a crime, but a tort. Thus, the complaint fails to  
 26 state a Section 1956(a) Predicate Act because the proceeds involved in a Section 1956 violation  
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1 cannot be based on the tort of conversion.

2 The term “specified unlawful activity” in Section 1956(a)(1) also has a specific  
3 definition. Defendants contend that the tort of conversion under state law is not listed as a  
4 “specified unlawful activity.” Defendants are correct that the tort of conversion is not a specified  
5 unlawful activity. See 18 U.S.C. § 1956(c)(7). Thus, the allegations alleged in the second  
6 cause of action for conversion cannot form the “specific unlawful activity” necessary for a  
7 Section 1956(a)(1) violation.

8 *ii. Use of Other Predicate Acts*

9 The “specified unlawful activity” at issue in a Section 1956(a) violation can be activities  
10 constituting an offense listed in 18 U.S.C. § 1961(1). See 18 U.S.C. § 1956(c)(7)(A). From the  
11 complaint, it appears that Plaintiffs are alleging that the other Predicate Acts alleged in the  
12 complaint are also a “specified unlawful activity” for the purposes of a Section 1956(a) violation.  
13 Section 1956(a)(1) essentially provides a separate predicate act for engaging in financial  
14 transactions with the intent to promote or conceal other racketeering acts. As such, the  
15 complaint states a “specific unlawful activity” necessary for a Section 1956(a)(1) violation to the  
16 extent it states another predicate act as alleged in Section 1961(1).<sup>6</sup>

17 As discussed in this memorandum opinion and order, the complaint fails to state another  
18 predicate act as listed in Section 1961(1). As discussed above, the complaint fails to state a  
19 predicate act for theft. As discussed above, the complaint fails to state a predicate act for mail  
20 and wire fraud. As discussed above, the complaint fails to state a predicate act for a violation of  
21 the Travel Act. As discussed below, the complaint fails to state a predicate act for unlawful  
22 monetary transactions. As discussed below, the complaint fails to state a predicate act for  
23 counterfeiting. Because the complaint fails to adequately allege a predicate act listed in Section  
24 1961(1), Predicate Act Four for money laundering also fails because the complaint fails to allege  
25

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26 <sup>6</sup> In addition, the defendant must have known that the property involved an activity that  
27 constitutes a felony under State, Federal, or foreign law. See 18 U.S.C. § 1956(c)(1).

1 the “specified unlawful activity” necessary for a money laundering predicate act.

2 iii. Robbery

3 The court notes that the complaint alleges a robbery within its allegations concerning  
4 Section 1956(a) money laundering. Section 1961(1)(A) lists specific crimes that can constitute  
5 predicate acts of racketeering. Under Section 1956(c)(1), this list can also serve as the  
6 “specified unlawful activity” necessary to show Section 1956(a) money laundering. One of the  
7 specific crimes listed in Section 1961(a)(A) is any act or threat involving robbery which is  
8 chargeable under State law and punishable by imprisonment for more than one year. Robbery  
9 chargeable under state law for punishment by imprisonment for more than one year could also  
10 constitute a felony, as to meet the “knowing that the property involved in a financial transaction  
11 represents the proceeds of some form of unlawful activity” requirement. Thus, the crime of  
12 robbery can be the basis of a money laundering violation.

13 The complaint does not discuss this alleged robbery within Predicate Act Four, within  
14 another alleged predicate act, or elsewhere in the complaint. The complaint simply does not  
15 plead enough facts to allege the felony of robbery for the court to find Plaintiffs could prove a  
16 robbery that is plausible on its face. See Twombly, 127 S.Ct. at 1974. The court recognizes  
17 that the complaint attempts to allege a conversion and generally discusses Defendants’ taking  
18 Plaintiffs’ money. However, while the complaint does not need to contain detailed factual  
19 allegations, merely alleging that all Defendants committed a robbery as defined in Section  
20 1961(1)(A) is not enough to raise Plaintiffs’ right to relief above the speculative level. See  
21 Twombly, 127 S.Ct. at 1964-65. Thus, the court finds that the complaint fails allege a robbery,  
22 and as such, the complaint fails to allege a “specified unlawful activity” necessary for a money  
23 laundering predicate act.

24 iv. Leave to Amend

25 The court will dismiss this predicate act with leave to amend within certain parameters.  
26 Because the time frame within which these alleged financial transactions occurred is unclear, this  
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1 predicate act will be dismissed with leave to amend to provide additional details about when the  
2 financial transactions took place. In addition, Plaintiffs are given leave to include additional  
3 allegations about an alleged robbery that Defendants attempted to promote or conceal through  
4 financial transactions. Finally, if the amended complaint states another viable predicate act, for  
5 which Plaintiffs' have been given leave to amend, Plaintiffs may also amend their Section  
6 1957(a) predicate act to include this Section 1961(1) act as a "specified unlawful activity".

7 **e. Predicate Act Five – Monetary Transactions in Violation of Section 1957**

8 Title 18 U.S.C. § 1957(a) prohibits knowingly engaging or attempting to engage in a  
9 monetary transaction in criminally derived property of a value greater than \$10,000 that is  
10 derived from specified unlawful activity. For a Section 1957(a) violation, the term "specified  
11 unlawful activity" has the meaning given that term in Section 1956(a) discussed above. See 18  
12 U.S.C. § 1957(f)(3).

13 Plaintiffs' allegations concerning the alleged Section 1957(a) predicate act are essentially  
14 identical to the allegations just discussed concerning the alleged Section 1956(a) predicate act of  
15 money laundering. Because both sections define "specified unlawful activity" the same, this  
16 alleged predicate act will suffer the same fate as the Section 1956(a) predicate act.

17 The court will dismiss this predicate act with leave to amend within certain parameters.  
18 Because the time frame within which the alleged financial transactions occurred is unclear, this  
19 predicate act will be dismissed with leave to amend to provide additional details about when the  
20 financial transactions took place. In addition, if the amended complaint states another viable  
21 predicate act, for which Plaintiffs' have been given leave to amend, Plaintiffs may also amend  
22 their Section 1957(a) monetary transaction predicate act to include this act as a "specified  
23 unlawful activity." Finally, Plaintiffs are given leave to include additional allegations that  
24 Defendants engaging or attempting to engage in a monetary transaction in criminally derived  
25 property of a value greater than \$10,000 that is derived from a robbery.

1           *f. Predicate Act Six – Trafficking in Counterfeit Goods*

2           The complaint alleges that witnesses during the Flores I trial testified that they  
3 misbranded or otherwise altered marks to falsely identify the contents of a container.  
4 Specifically, the complaint allege that Defendants changed the marks on containers showing the  
5 size and grade of the inclosed fruit after it had been inspected by U.S.D.A. Inspectors. The  
6 complaint alleges the marks put on the shipping containers were interposed and carried over to  
7 billing statements submitted to buyers. The complaint alleges that this conduct violated 18  
8 U.S.C. § 2320 and 21 U.S.C. § 331(a)(b)(c)(k).

9           *i. Counterfeiting*

10          Title 18 U.S.C. § 2320 prohibits trafficking or attempting to traffic “in goods or services  
11 and knowingly uses a counterfeit mark on or in connection with such goods or services . . .  
12 knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause  
13 confusion, to cause mistake, or to deceive” 18 U.S.C. § 2320(a). Trafficking in goods or  
14 services bearing counterfeit marks can serve as a predicate act of racketeering. See 18 U.S.C. §  
15 1961(1).

16          Defendants contend that the complaint’s allegations fails to state a counterfeiting  
17 violation.<sup>7</sup> Defendants argue that the complaint’s allegations only allege that Defendants placed  
18 the wrong marks on containers, not that the Defendants used a “counterfeit mark” as required to  
19 prove counterfeiting. As used in Section 2320, the term “counterfeit mark” is given a specific  
20 definition. “Counterfeit mark” means a spurious mark that is used in connection with trafficking  
21 in any goods “that is identical with, or substantially indistinguishable from, a mark registered on  
22 the principal register in the United States Patent and Trademark Office and in use, whether or not  
23 the defendant knew such mark was so registered.” 18 U.S.C.A. § 2320(e)(1)(A). Here, the  
24

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25           <sup>7</sup> Defendants also contend this predicate act occurred outside the statute of limitations.  
26 As discussed above, the fact an act occurred outside the statute of limitations only bars Plaintiffs’  
27 from obtaining damages for this act, but does not bar the use of the act to show a pattern of  
28 racketeering.

1 complaint does not allege that Defendants used a mark that was identical or substantially  
2 indistinguishable from a grading mark. Rather, the complaint alleges that Defendants used  
3 legitimate grading marks. The complaint merely alleges that Defendants used the wrong mark  
4 on containers and/or changed the correct mark to the wrong mark to indicate a higher grade.  
5 Falsely identifying the contents of a container does not constitute counterfeiting as defined in  
6 Section 2320. Plaintiffs offer no argument or authority to the contrary. Thus, the complaint  
7 fails to allege a predicate act of counterfeiting. Given that the facts alleged do not constitute  
8 counterfeiting, allowing Plaintiffs leave to amend the complaint to add additional facts would be  
9 futile.

10 ii. Violations of the Federal Food, Drug, and Cosmetic Act

11 Predicate Act Six also states that the facts show a violation of 21 U.S.C. §  
12 331(a)(b)(c)(k). Title 21 U.S.C. § 331 lists prohibited acts under the Federal Food, Drug, and  
13 Cosmetic Act. Section 331(a) prohibits the “introduction or delivery for introduction into  
14 interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.”  
15 Section 331(b) prohibits the “adulteration or misbranding of any food, drug, device, or cosmetic  
16 in interstate commerce.” Section 331(c) prohibits the “receipt in interstate commerce of any  
17 food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered  
18 delivery thereof for pay or otherwise. Section 331(k) prohibits the “alteration, mutilation,  
19 destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of  
20 any other act with respect to, a food . . . if such act is done while such article is held for sale  
21 (whether or not the first sale) after shipment in interstate commerce and results in such article  
22 being adulterated or misbranded.”

23 The complaint’s allegations appear to allege violations of 21 U.S.C. § 331. Defendant’s  
24 alleged acts in misbranding or changing marks to falsely identify the contents of a container  
25 appear to be violations of 21 U.S.C. § 331. However, such allegations have no relevance to  
26 Plaintiffs’ RICO cause of action. As discussed above, RICO requires a pattern of racketeering  
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activities. See 18 U.S.C. § 1962(c); Odom, 486 F.3d at 547. Not all unlawful conduct is a racketeering activity, and 18 U.S.C. § 1961(1) defines what acts will constitute racketeering activity. Performing the prohibited conduct listed in 21 U.S.C. § 331 is not a predicate activity. The legality of Defendants' alleged misbranding and falsely identifying the contents of containers notwithstanding, this conduct is simply not a predicate act of racketeering. Thus, the complaint's alleged violations of 21 U.S.C. § 331 do not state a predicate act, and as such, do not show a pattern of racketeering. Given the complaint already states a violation of 21 U.S.C. § 331, allowing Plaintiffs leave to amend the complaint to add additional facts would be futile. No additional facts will add violations of 21 U.S.C. § 331 to the list of predicate activities.

**g. Predicate Act Seven – Violations of 18 U.S.C. § 1962(a) and 18 U.S.C. § 1962(b)**

The complaint lists as Predicate Act Seven violations of 18 U.S.C. § 1962(a) and 18 U.S.C. § 1962(b). Violations of these sections are not listed as predicate activities in Section 1961(1), and thus violations of these sections cannot serve as predicate acts of racketeering.

The RICO statute, found at 18 U.S.C. § 1962, lists several types of unlawful activities, which are set forth in subsections (a), (b), (c), and (d). 18 U.S.C. § 1962(a) prohibits investing income derived from a pattern of racketeering in an "enterprise." Section 1962(b) prohibits acquiring or maintaining an interest in an enterprise by means of a pattern of racketeering activity. Section 1962(c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. As alleged in the complaint and discussed by all parties, Plaintiffs are proceeding on a Section 1962(c) RICO cause of action. If Plaintiffs desire to proceed on a Section 1962(a) cause of action or a Section 1962(b) cause of action, Plaintiffs must plead separate RICO causes of action. These sections offer separate theories of liability and are not predicate acts of racketeering to support a Section 1962(c) cause of action.

Because it may be possible for Plaintiffs to allege a Section 1962(a) cause of action or a Section 1962(b) cause of action, Plaintiffs will be given leave to amend to add allegations concerning these sections. However, Plaintiffs are forewarned that they may not use

1 racketeering activities found barred by this order as to Plaintiffs' Section 1962(c) RICO cause of  
 2 action to support an alleged Section 1962(a) cause of action or a Section 1962(b) cause of action.  
 3 Although the court will allow Plaintiffs leave to amend to an allege a Section 1962(a) cause of  
 4 action and/or a Section 1962(b) cause of action, Plaintiffs are advised that any amended  
 5 complaint that includes such causes of action must be based upon a well-founded belief that a  
 6 cognizable or arguable legal theory exists that would support such a cause of action. See Fed. R.  
 7 Civ. P. 11.

8  
 9 **F. NEGLIGENCE – BREACH OF THE DUTY OF CARE**

10 The complaint alleges that the shareholder/members of the DDJ Entities breached their  
 11 duty of care by aiding and abetting in tortuous conduct against Plaintiffs in this action. The  
 12 complaint alleges that Defendants knew or should have known that their actions would injure  
 13 Plaintiffs, and negligently failed to take or order appropriate actions to avoid harming Plaintiffs.  
 14 The complaint alleges that the shareholder/members of the DDJ Entities participated in all the  
 15 referenced torts alleged in the complaint, thereby the shareholder/members intentionally breached  
 16 their fiduciary duty to the DDJ Entities, and in so doing, breached their duty of care to Plaintiffs  
 17 as a third party. The complaint alleges that Defendants were safeguarding assets and proceeds  
 18 for Plaintiffs, and as such, owed a duty to Plaintiffs that a normal prudent person would carry out.  
 19 Specifically, the complaint alleges that between August 1999 and September 23, 2003,  
 20 Defendants paid themselves dividends and proceeds in an amount that exceeds Plaintiffs'  
 21 judgment in Flores I. The complaint also alleges that Defendants breached their duty by  
 22 availing themselves to the proceeds and Plaintiffs have not been able to collect those proceeds  
 23 and assets that were in Defendants' control since 1995.

24 In their motion to dismiss, Defendants contend that this negligence cause of action is  
 25 based on the jury verdict in Flores I. Defendants claim that they are unable to decipher what  
 26 duty that they owed to Plaintiffs that they allegedly breached. Defendants argue that because  
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the complaint fails to allege a duty, this negligence cause of action must be dismissed.

In the opposition, Plaintiffs contend that Defendants, as owners, shareholders, members, directors and agents of the DDJ Entities, knowingly participated in all the torts referenced in the complaint. Plaintiffs then go on to discuss the licensing structure of the DDJ Entities and the Perishable Agricultural Commodities Act (“PACA”). Plaintiff argue that Defendants were safeguarding assets and proceeds for Plaintiffs. Plaintiffs also discuss the rule holding that corporate officers and directors cannot escape liability for their own wrongdoing by contending they were acting on behalf of the corporation.

### **1. Legal Standards for Negligence**

In California, the elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and the breach as the proximate cause of the resulting injury. Ladd v. County of San Mateo, 12 Cal.4th 913, 917-18 (1996); Mendoza v. City of Los Angeles, 66 Cal.App.4th 1333, 1339 (1998). At issue in the pending motion to dismiss is whether Defendants owed Plaintiffs any duty.

As correctly discussed by Plaintiffs in their opposition, directors and officers of a corporation are liable for torts committed by them on the corporation’s behalf. Frances T. v. Village Green Owners Assn., 42 Cal.3d 490, 503-04 (1986); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal.3d 586, 595 (1970); PMC, Inc. v. Kadisha, 78 Cal.App.4th 1368, 1382 (2000); O’Connell v. Union Drilling & Petroleum Co., 121 Cal.App. 302, 308-09 (1932). For example, in PMC, Inc. v. Kadisha, 78 Cal.App.4th 1368 (2000), the California Court of Appeal found that directors, officers, and principal shareholders could be held liable for misappropriation of trade secrets and other corporate misconduct if they knew or had reason to know that employees, who once worked for a competitor, were using stolen confidential information and processes. Id. at 1385. In Michaelis v. Benavides, 61 Cal.App.4th 681 (1998), the California Court of Appeal held that a corporate president who personally participated in and directed the construction of the plaintiffs’ patio and driveway, which was alleged to be

1 structurally inadequate, could be held personally liable because he breached his duty to the  
 2 plaintiffs, and not just his duty to the corporation. In Granoff v. Yackle, 196 Cal.App.2d 253  
 3 (1961), a corporate officer who misappropriated funds for the corporation's benefit was held  
 4 personally liable. Id. at 256-57. In McClory v. Dodge, 117 Cal.App. 148 (1931), directors who,  
 5 through reasonable diligence and care could have known that they did not own stock acquired  
 6 under exchange agreement, were held personally liable for value along with the corporation. Id.  
 7 at 153, *disapproved on other grounds in* Mary Pickford Co. v. Bayly Bros., 12 Cal.2d 501, 522  
 8 (1939). Plaintiffs' correctly cite to Granoff v. Yackle, 196 Cal.App.2d 253 (1961), which holds:

9 It is well settled by the great weight of authority in this country that the officers of  
 10 a corporation are personally liable to one whose property has been converted by  
 11 them to the uses of the corporation, although they derived no personal benefit  
 12 therefrom and acted merely as agents of the corporation. The underlying reason  
 for this rule is that an officer should not be permitted to escape the consequences  
 of his individual wrongdoing by saying that he acted on behalf of a corporation in  
 which he was interested.

13 Granoff, 196 Cal.App.2d at 257 (internal quotes and citations omitted).

14 Plaintiffs' legal discussion is sound and, under the principle of agency, directors are liable  
 15 along with corporations for torts. The problem with Plaintiffs' position is **not** the law they cite.  
 16 Rather, the problem is that the complaint is unclear on exactly what conduct Defendants did as  
 17 the agents of the DDJ Entities that constituted a tort on Plaintiffs.

## 18 **2. Defendants' Actions as the DDJ Entities' Agents for Events Litigated in Flores I**

19 From the opposition, it appears Plaintiffs contend that Defendants, as directors and agents  
 20 of the DDJ Entities, were the ones that actually committed the torts against Plaintiffs that were  
 21 litigated in Flores I and found true by the jury. Plaintiffs allege that Defendants failed to pay  
 22 them sums owed going all the way back to 1995. Thus, it appears that Defendants' liability is  
 23 based on the torts committed by the DDJ Entities because Defendants were the DDJ Entities'  
 24 agents and the persons who committed the Flores I torts on the DDJ Entities' behalf.

25 Presuming that Defendants' liability is based on the DDJ Entities' negligence, this 2005  
 26 case is not the place to contend that Defendants should be liable to Plaintiffs, along with the DDJ



Entities, for the torts the DDJ Entities committed. Plaintiffs cannot now obtain damages against Defendants for their actions on the DDJ Entities' behalf that were litigated and resolved in Flores I. To the extent the jury in Flores I found that the DDJ Entities committed torts against Plaintiffs, and to the extent various Defendants committed these torts while serving as the DDJ Entities' agents, Plaintiffs may have alleged a viable theory of liability as to these Defendants. The problem is the time to have raised these contentions was during Flores I. Plaintiffs' claims that Defendants, on DDJ Entities' behalf, failed to turn over money that belonged to Plaintiffs from their fruit was litigated in Flores I. While Flores I only sought to impose liability on the DDJ Entities, Flores I could have alleged torts committed by Defendants under the theory that Defendants are liable for torts, along with the DDJ Entities, based on their positions as the DDJ Entities' agents. Because this negligence / tort theory based on Defendants' unlawful conduct could have been raised in Flores I the court declines to allow a duplicative action on such a theory now. See Adams, 487 F.3d at 692. In addition, negligence / torts based on Defendants' conduct between 1995 and 1999 are barred by the statute of limitations.

### **3. Negligence Occurring After 1999 and Not Litigated in Flores I**

While the opposition seems to imply the complaint's negligence claim is based on Defendants' actions as agents for the DDJ Entities, for which the DDJ Entities were held liable in Flores I, the court does recognize that the complaint itself contains a factual basis for negligence apart from improper payments between 1995 and 1999. The complaint also alleges that Defendants, at times after 1999, unlawfully took the DDJ Entities' assets for their own purposes, including funding Defendant Yosemite. While it is unclear exactly when this conduct occurred, it appears to have occurred after 1999, and thus this conduct would not be duplicative of Flores I.

As to this factual contention, Plaintiffs have not alleged what duty Defendants owed to Plaintiffs. The law concerning an agent's liability for actions done on behalf of a corporation is of no assistance because Plaintiffs have not shown that the DDJ Entities were negligent toward Plaintiffs by allowing their funds to be depleted. Plaintiffs have not shown what duty of care

1 the DDJ Entities or any agent of the DDJ Entities owed to them after 1999. Making Plaintiffs'  
2 argument for them, it appears that Plaintiffs believe that the DDJ Entities, and thus any agent of  
3 the DDJ Entities, owed them a duty to ensure that the DDJ Entities had enough money to pay off  
4 the judgment in Flores I. However, Plaintiffs have cited no statute or case authority supporting  
5 such a theory. It is not this court's obligation to search statutes and case law to determine if such  
6 a duty is owed to plaintiffs in a lawsuit. Thus, the court finds that the complaint fails to state a  
7 cause of action for negligence.

8 While it is doubtful Plaintiffs will be able to allege a duty to preserve the DDJ Entities'  
9 funds that was owed by the DDJ Entities and/or Defendants, the court will dismiss Plaintiffs'  
10 negligence claim with leave to amend. However, such a negligence claim may only concern  
11 Defendants failure to preserve the funds DDJ Entities should have had to pay the Flores I  
12 judgment, and this claim may not include negligence or other duties imposed by the packing  
13 relationship litigated in Flores I. Plaintiffs are advised that any amended complaint that  
14 includes a negligence cause of action must be based upon a well-founded belief that a cognizable  
15 or arguable legal theory exists that would support a finding that Defendants owed a duty to  
16 Plaintiffs to preserve the DDJ Entities' assets. See Fed. R. Civ. P. 11.

#### 18 **G. CIVIL CONSPIRACY**

19 Defendants contend that the fifth cause of action for civil conspiracy fails to state a claim.  
20 The complaint's specific allegations concerning conspiracy are minimal. The complaint alleges  
21 that Defendants conspired amongst themselves by aiding and abetting to commit the wrongful  
22 acts as alleged in the complaint. The complaint also alleges that Defendants were the  
23 fiduciaries of the DDJ Entities. In the motion to dismiss, Defendants contend that even if  
24 Plaintiffs have alleged Defendants were the DDJ Entities' fiduciaries, the complaint still fails to  
25 allege an agreement by Defendants to perform a wrongful act with knowledge that the act was  
26 wrongful.

## 1 **1. Separate Cause of Action for Conspiracy**

2 The complaint's fifth cause of action alleges civil conspiracy as a free standing cause of  
3 action. However, under California law, civil conspiracy is not a separate and distinct cause of  
4 action. Entm't Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1228 (9<sup>th</sup>  
5 Cir. 1997). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on  
6 persons who, although not actually committing a tort themselves, share with the immediate  
7 tortfeasors a common plan or design in its perpetration. Applied Equipment Corp. v. Litton  
8 Saudi Arabia Ltd., 7 Cal.4th 503, 510-11 (1994). There is no civil action for conspiracy to  
9 commit a recognized tort unless the wrongful act itself is committed and damages result.  
10 Mehrtash v. Mehrtash, 93 Cal.App.4th 75, 82 (2001). Through participation in the conspiracy,  
11 each coconspirator "effectively adopts as his or her own the torts of other coconspirators within  
12 the ambit of the conspiracy." Applied Equipment Corp., 7 Cal.4th at 511. Standing alone, "a  
13 conspiracy does no harm and engenders no tort liability. It must be activated by the commission  
14 of the actual tort." Id. Because conspiracy is not an independent tort, "it allows tort recovery  
15 only against a party who already owes a duty and is not immune from liability based on  
16 applicable substantive tort law principles." Id. Thus, based on the applicable law, the  
17 complaint fails to state a cause of action for conspiracy because no independent cause of action  
18 for conspiracy exists.

## 19 **2. Conspiracy to Commit Other Torts**

20 From the complaint, it is possible that Plaintiffs' conspiracy theory is that there was a  
21 conspiracy to commit the other torts alleged in the complaint, including malicious prosecution,  
22 abuse of process, conversion, and negligence. However, as noted above, Plaintiffs' malicious  
23 prosecution, abuse of process, conversion, and negligence causes of action all fail to state a  
24 claim. In the absence of allegations showing malicious prosecution, abuse of process, conversion,  
25 and negligence, the complaint fails to allege a conspiracy to commit these torts.

1 **3. Allegations Concerning Elements**

2 The complaint also fails to allege the elements of conspiracy. Liability for civil  
3 conspiracy generally requires three elements: (1) formation of the conspiracy (an agreement to  
4 commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and  
5 (3) damage resulting from operation of the conspiracy. Applied Equipment Corp., 7 Cal.4th at  
6 511. The major significance of a civil conspiracy “lies in the fact that it renders each participant  
7 in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong,  
8 irrespective of whether or not he was a direct actor and regardless of the degree of his activity.”  
9 Doctors' Co. v. Superior Court, 49 Cal.3d 39, 44 (1989). The complaint does not allege any  
10 agreement between Defendants to perform a wrongful act or knowledge that the act was wrong.  
11 Thus, the conspiracy cause of action is subject to dismissal.

12 In the opposition, Plaintiffs clarify the basis of their conspiracy claim. Plaintiffs contend  
13 that Defendants, as the owners of the DDJ Entities, had unbridled control over the DDJ Entities.  
14 Plaintiffs then allege that the DDJ Entities were found by a jury to have maliciously,  
15 oppressively, or fraudulently converted Plaintiffs’ property. The court takes the opposition’s  
16 allegations to mean that Plaintiffs believe there was a conspiracy between Defendants to use the  
17 DDJ Entities to fraudulently convert Plaintiffs’ property. The references to the jury’s finding in  
18 Flores I, the use of this verdict as an exhibit, and Plaintiffs’ legal discussion about directors’  
19 liability for their participation in a corporation’s tortuous conduct lead the court to conclude that  
20 the basis of the conspiracy is Defendants’ actions, on behalf of the DDJ Entities, between 1995  
21 and 1999, to convert Plaintiffs’ fruit. A conspiracy cause of action based on a conspiracy  
22 between Defendants, and also possibly the DDJ Entities, to fraudulently convert Plaintiffs’  
23 property as it pertains to the DDJ Entities not paying Plaintiffs all money owed, as found by the  
24 jury in Flores I, is not available in this action for two reasons.

25 First, a conspiracy claim based on the Defendants’ alleged conspiracy to fraudulently  
26 convert Plaintiffs’ property is barred by the statute of limitations. “Whether or not a cause of  
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28

1 action for conspiracy is timely must be determined by reference to the statute of limitations  
 2 applicable to the underlying cause of action.” Filmservice Laboratories, Inc. v. Harvey Bernhard  
 3 Enterprises, Inc., 208 Cal.App.3d 1297, 1309 (1989). A three-year statute of limitations applies  
 4 to fraud claims. Cal. Civ. Pro. Code § 338(d) A three-year statute of limitations also applies to  
 5 conversion claims. Cal. Civ. Proc. § 338(c); Bono v. Clark, 103 Cal.App.4th 1409, 1432 (2002).  
 6 Thus, any conversion claim based on acts occurring prior to March 1, 2002, is barred by the  
 7 statute of limitations. Because Plaintiffs imply their conspiracy claim is based on the same fraud  
 8 and conversion that resulted in the Flores I verdict, the three year statute of limitations bars  
 9 Plaintiffs’ conspiracy claim.

10 Second, such a conspiracy claim is duplicative of Flores I. A cause of action alleging that  
 11 Defendants conspired with each other, and possibly the DDJ Entities, could have been raised in  
 12 Flores I. The court declines to allow a duplicative action on a theory that could have been, but  
 13 was not, raised in Flores I. See Adams, 487 F.3d at 692.<sup>8</sup>

#### 14 **4. Leave to Amend**

15 The conspiracy cause of action is subject to dismissal. The court declines to give leave  
 16 to amend the conspiracy claim. Further factual allegations would not resolve the duplicative  
 17 nature of the conspiracy claim and not resolve the statute of limitation problems discussed above.

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21 <sup>8</sup> In the opposition to the conspiracy claim, Plaintiffs mention violations of California  
 22 Business and Professions Code §§ 17200 and 17500. Section 17200 defines unfair competition  
 23 as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or  
 24 misleading advertising and any act prohibited by Chapter 1." Section 17500 prohibits false or  
 25 misleading statements by any person, firm, corporation, association, or any employee thereof. It  
 26 appears Plaintiffs cite these sections as a basis to show Defendants are liable for the actions of  
 27 the DDJ Entities. Not only is there no cause of action based on California Business and  
 28 Professions Code §§ 17200 and 17500 in the complaint, these Sections do not explain how  
 Defendants can be liable now for the Flores I verdict based on their alleged control over the DDJ  
 Entities at the time the DDJ Entities violated Plaintiffs’ rights. These Sections offer no basis for  
 a conspiracy claim and no explanation for how a conspiracy claim based on the DDJ Entities’  
 actions is not barred by the statute of limitations. Thus, they will not be discussed further.

## 1 H. CONSTRUCTIVE TRUST

2 The complaint alleges that the causes of action in the complaint give rise to a constructive  
 3 trust that arises by operation of law as a response to Defendants' wrongful actions. The  
 4 complaint alleges that Defendants breached their duty to Plaintiffs by converting Plaintiffs'  
 5 property and used said conversion of property, for among other things, purchasing ownership  
 6 shares of Defendant Yosemite, paying off on a compromise settlement with T&T on September  
 7 23, 2003, and paying illegal dividends to the DDJ Entities' shareholders and members.  
 8 Defendants contend that the complaint does not allege a constructive trust because the complaint  
 9 fails to trace specific funds currently in Defendants' possession to Plaintiffs' apple proceeds.

10 Preliminarily, the court notes that a constructive trust is not a cause of action but rather an  
 11 equitable remedy. Stansfield v. Starkey, 220 Cal.App.3d 59, 76 (1990); 13 Witkin, CAL.  
 12 PROCEDURE, TRUSTS, §319 (2005). Thus, to the extent Plaintiffs seek to maintain an  
 13 independent cause of action for a constructive trust, no such cause of action is available.  
 14 Accordingly, the sixth cause of action for a constructive trust is subject to dismissal. However, a  
 15 constructive trust can be a remedy. As such, the court will consider whether the complaint  
 16 validly alleges a constructive trust as a remedy.

17 Constructive trusts are generally covered by statute. California Civil Code § 2224  
 18 provides:

19 One who gains a thing by fraud, accident, mistake, undue influence, the violation  
 20 of a trust, or other wrongful act, is, unless he or she has some other and better  
 21 right thereto, an involuntary trustee of the thing gained, for the benefit of the  
 22 person who would otherwise have had it.

22 Cal.Civ.Code § 2224. The imposition of a constructive trust requires: (1) the existence of res  
 23 (property or some interest in property); (2) the right of the complaining party to that res; and (3)  
 24 some wrongful acquisition or detention of the res by another party who is not entitled to it.  
 25 Cassirer v. Kingdom of Spain, 461 F.Supp.2d 1157, 1178 (C.D.Cal. 2006); Campbell v.  
 26 Superior Court, 132 Cal.App.4th 904, 920 (2005); Communist Party v. 522 Valencia, Inc., 35

1 Cal.App.4th 980, 990 (1995).

2 A constructive trust is an involuntary equitable trust created by operation of law as  
3 a remedy to compel the transfer of property from the person wrongfully holding it  
4 to the rightful owner. [Citations.] The essence of the theory of constructive trust is  
to prevent unjust enrichment and to prevent a person from taking advantage of his  
or her own wrongdoing.

5 Communist Party, 35 Cal.App.4th at 990.

6 A constructive trust is imposed where there is a wrongful acquisition of property. The  
7 complaint alleges that Defendants' wrongful acquisition was done when Defendants breached  
8 their duty to Plaintiffs and converted Plaintiffs' property. As explained above, the complaint  
9 fails to state a cause of action for either negligence or conversion. Thus, the complaint also fails  
10 to allege an entitlement to a constructive trust because the complaint fails to allege a wrongful act  
11 requiring a constructive trust.

12 Regardless, Defendants correctly argue that there is nothing on which to impose a  
13 constructive trust. A constructive trust requires "money or property identified as belonging in  
14 good conscience to the plaintiff [which can] clearly be traced to particular funds or property in  
15 the defendant's possession." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1150  
16 (2003) (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002)). A  
17 constructive trust is available where the specific res or funds can be identified and attached, "but  
18 not where the plaintiff seeks to impose general personal liability as a remedy for the defendant's  
19 monetary obligations." Honolulu Joint Apprenticeship and Training Committee of United Ass'n  
20 Local Union No. 675 v. Foster, 332 F.3d 1234, 1238 (9<sup>th</sup> Cir. 2003).

21 The complaint does not allege that Defendants took and continue to hold certain property  
22 or money belonging to Plaintiffs. Rather, the complaint alleges that Defendants took money in  
23 the DDJ Entities' possession, which belonged to Plaintiffs, and purchased ownership shares in  
24 Defendant Yosemite, paid off a compromise settlement with T&T, and paid illegal dividends.  
25 Other than the alleged illegal dividends, the complaint's clear allegations are that the money at  
26 issue is no longer in Defendants' possession. The complaint fails to trace funds or property in  
27  
28



1 Defendants' possession to property or money belonging to Plaintiffs. The complaint fails to  
2 allege that the money paid as illegal dividends or property purchased with Plaintiffs' money is  
3 still in Defendants' possession. Thus, the complaint fails to allege that particular funds in  
4 Defendants' current possession can be traced to money belonging to Plaintiffs.

5 Where the property sought to be recovered, or its proceeds, have been dissipated so that  
6 no product remains, the plaintiff cannot enforce a constructive trust and the plaintiff's claim is  
7 that of a general creditor. Great-West Life & Annuity Ins. Co., 534 U.S. at 213-14. To obtain a  
8 constructive trust, "the action generally must seek not to impose personal liability on the  
9 defendant, but to restore to the plaintiff particular funds or property in the defendant's  
10 possession." Id. at 214. Here, Plaintiffs seek to obtain money Plaintiffs contend they were  
11 deprived of by Defendants' unlawful actions. Such an allegation may, if based on cognizable  
12 causes of action, allow for monetary damages. This allegation, however, does not provide for a  
13 constructive trust over particular funds in Defendants' current possession. Thus, to the extent  
14 the complaint requests a constructive trust as a remedy, this remedy is not available based on the  
15 complaint's allegations. Accordingly, the request for a constructive trust must be dismissed.

16  
17 **ORDER**

18 Accordingly, based on the above memorandum opinion and order, the court ORDERS  
19 that:

20  
21 A. The causes of action and allegations against the Fike Defendants, found on pages  
22 11 through 15 of the complaint, are HEREBY STRICKEN.

23  
24 B. Defendants' motion to dismiss is GRANTED.

25  
26 C. The complaint is DISMISSED WITHOUT LEAVE TO AMEND EXCEPT as  
27

1 allowed for by this order as follows.

2  
3 D. Plaintiffs are GRANTED LEAVE to file an amended complaint that contains:

4 1. An 18 U.S.C. § 1962(c) RICO Cause of Action based on:

5 a. The Predicate Act of mail and wire fraud in violation of 18 U.S.C.  
6 §§ 1341, 1343.

7 b. The Predicate Act of money laundering in violation of 18 U.S.C. §  
8 1956(a)(1) if such amended complaint contains the time frame  
9 within which the alleged financial transactions occurred, additional  
10 facts supporting a robbery, and additional facts supporting mail and  
11 wire fraud.

12 c. The Predicate Act of monetary transactions in violation of 18  
13 U.S.C. § 1957(a) if such amended complaint contains the time  
14 frame within which the alleged financial transactions occurred,  
15 additional facts supporting a robbery, and additional facts  
16 supporting mail and wire fraud.

17 2. An 18 U.S.C. § 1962(a) RICO cause of action and/or a Section 1962(b)  
18 RICO cause of action so long as the allegations for these new RICO causes  
19 of action do not include theories found barred by the court in this order.

20 3. A negligence cause of action based on Defendants' failure to preserve the  
21 funds the DDJ Entities should have had available to pay the Flores I  
22 judgment.

23 4. Allegations requesting a constructive trust.

24 //

1 E. The following causes of action are DISMISSED WITHOUT LEAVE TO  
2 AMEND:

- 3 1. Malicious Prosecution.
- 4 2. Malicious Use of Process.
- 5 3. Conversion.
- 6 4. The Portions of the 18 U.S.C. § 1962(c) RICO Cause of Action based on:
  - 7 a. The Predicate Act of theft in violation of 18 U.S.C. § 659.
  - 8 b. The Predicate Act of interstate travel to aid a racketeering  
9 enterprise in violation of 18 U.S.C.A. § 1952.
  - 10 c. The Predicate Act of trafficking in counterfeiting in violation of 18  
11 U.S.C. § 2320.
  - 12 d. The Predicate Act of a violation of the Federal Food, Drug, and  
13 Cosmetic Act as prohibited by 21 U.S.C. § 331(a)(b)(c)(k).
- 14 5. The Portions of the RICO Cause of Action that seek damages for acts  
15 occurring prior to 2001.<sup>9</sup>
- 16 6. Any negligence cause of action based on a theory or duty other than  
17 Defendants' failure to preserve the funds the DDJ Entities should have had  
18 available to pay the Flores I judgment.
- 19 7. Any cause of action resting on a conspiracy theory of liability.
- 20

21 F. Plaintiffs shall file any amended complaint within thirty days of this order's date  
22 of service.

23  
24 G. Plaintiffs are FOREWARNED that failure to file an amended complaint within  
25

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26 <sup>9</sup> Earlier conduct that serves as a predicate act to establish a pattern of racketeering, for  
27 which Plaintiffs do not seek damages, may be included.

thirty days that complies with the confines of this order will result in sanctions,  
including dismissal of this action.

IT IS SO ORDERED.

**Dated: June 17, 2008**

**/s/ Anthony W. Ishii**  
**UNITED STATES CHIEF DISTRICT JUDGE**